MISSISSIPPI LAW JOURNAL

PREFACE

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Robert N. Davis

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Current subscription: $35.00 per year. Single issue: $12.00. Subscriptions are renewed automatically upon expiration unless the subscriber sends notice of termination. For information about subscriptions, please call (601)232-7361, Extension 111.

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Citations conform to A Uniform System of Citation (15th ed. 1991).

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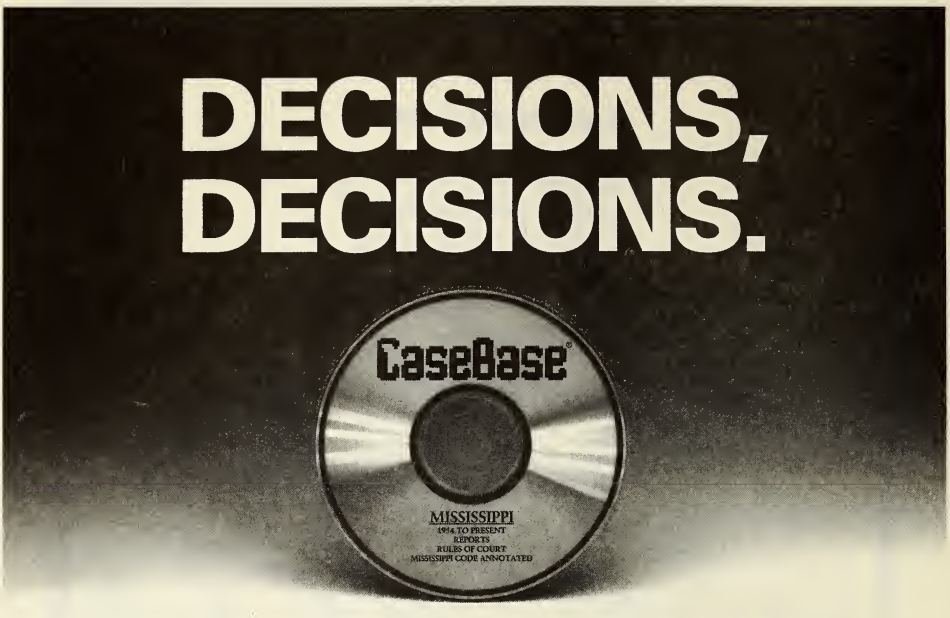

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Mississippi Law Journal

Published by Students at the University of Mississippi School of Law

VOLUME 62 WINTER 1993 NUMBER 2

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Mississippi Law Journal

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VOLUME 62 WINTER 1993 NUMBER 2

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PREFACE

Judge Goldberg began the opinion of the three judge panel of the Fifth Circuit in *Ayers v. Allain*[1] with the following stanza inspired by Lewis Carroll's poem *Through the Looking Glass and What Alice Found There*:

'The time has come,' the Walrus said, 'To
talk of many things:
Of shoes— and ships— and sealing wax—Of
Cabbages— and kings—
And why the sea is boiling hot— and
whether pigs have wings.'

We'll sit and chat of times gone by, and visit
with the queens
Brown, and, *Sweatt* and *Meredith* not to
mention the fertile *Green*
And then we'll see why *Ayers* should fly
and how equality is king![2]

What was the significance? What message was the legal community supposed to infer from this selection from Carroll? Was it simply to alert us to the fact that this litigation involved complicated facts on subjects as broad as "shoes—and ships—and sealing-wax" and hot showers, ACTs, and disestablishment? Or was Judge Goldberg guiding us to the complete poem so that in reading it we might draw a parallel between the private plaintiffs in *Ayers* and the duped Oysters in Wonderland, striving to achieve equality, yet realizing the system was aligned against them? Or possibly, is the parallel

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[1] 893 F.2d 732 (5th Cir.), *rev'd*, 914 F.2d 676 (5th Cir. 1990) (en banc), *aff'g* 674 F. Supp. 1523 (N.D. Miss. 1987), *vacated sub nom.*, United States v. Fordice, 111 S. Ct. 2727 (1992).

[2] *Id.* at 734.

more properly drawn between the State of Mississippi as the Oysters sucked dry by a well meaning, but never-the-less self-serving class of black citizens demanding equality, but defining equality in their own terms?

These questions are too important to the citizens of Mississippi and this nation, both black and white, to go unanswered. Likewise, the issue is too important for good citizens to not be fully informed so that reasoned answers are possible. To facilitate in the question answering process, the articles that follow provide a complete picture of the entire *Ayers* litigation. The process begins with a background of the political situation surrounding the case, then moves to a detailed background on the legal concepts involved. The next piece strives to present the parties' positions; the private plaintiff class of black citizens, the United States and the State of Mississippi, *et. al.* The topic is concluded with a look at the United States Supreme Court's opinion. The author analyzes the opinion and offers possible remedies. We challenge you to read and reflect on the articles as a whole and to ultimately reach your own well reasoned conclusions. After all, even Alice knew that what you see through a looking glass is nothing more than what you place before it.

Editor's Note: Lewis Carroll's poem from *Through the Looking Glass and What Alice Found There*, Chapter IV, Tweedledum and Tweedledee, is presented in its entirety on the following page.

"The sun was shining on the sea,
Shining with all his might:
He did his very best to make
The billows smooth and bright—
And this was odd, because it was
The middle of the night.

The moon was shining sulkily,
Because she thought the sun
Had got no business to be there
After the day was done—
'It's very rude of him,' she said,
'To come and spoil the fun!'

The sea was wet as wet could be,
The sands as dry as dry.
You could not see a cloud, because
No cloud was in the sky:
No birds were flying overhead—
There were no birds to fly.

The Walrus and the Carpenter
Were walking close at hand;
They wept like anything to see
Such quantities of sand:
'If this were only cleared away,'
They said, 'it would be grand!'

'If seven maids with seven mops
Swept it for half a year,
Do you suppose,' the Walrus said,
'That they could get it clear?'
'I doubt it,' said the Carpenter,
And shed a bitter tear.

'O Oysters, come and walk with us!'
The Walrus did beseech.
'A pleasant walk, a pleasant talk,
Along the briny beach:
We cannot do with more than four,
To give a hand to each.'

The eldest Oyster looked at him,
But never a word he said:
The eldest Oyster winked his eye,
And shook his heavy head—
Meaning to say he did not choose
To leave the oyster-bed.

But four young Oysters hurried up,
All eager for the treat:
Their coats were brushed, their faces washed,
Their shoes were clean and neat—
And this was odd, because, you know,
They hadn't any feet.

Four other Oysters followed them,
And yet another four;
And thick and fast they came at last,
And more, and more, and more—
All hopping through the frothy waves,
And scrambling to the shore.

The Walrus and the Carpenter
Walked on a mile or so,
And then they rested on a rock
Conveniently low:
And all the little Oysters stood
And waited in a row.

'The time has come,' the Walrus said,
'To talk of many things:
Of shoes—and ships—and sealing-wax—
Of cabbages—and kings—
And why the sea is boiling hot—
And whether pigs have wings.'

'But wait a bit,' the Oysters cried,
'Before we have our chat;
For some of us are out of breath,
And all of us are fat!'
'No hurry!' said the Carpenter.
They thanked him much for that.

'A loaf of bread,' the Walrus said,
'Is what we chiefly need:
Pepper and vinegar besides
Are very good indeed—
Now if you're ready, Oysters dear,
We can begin to feed.'

'But not on us!' the Oysters cried,
Turning a little blue,
'After such kindness, that would be
A dismal thing to do!'
'The night is fine,' the Walrus said.
'Do you admire the view?'

'It was so kind of you to come!
And you are very nice!'
The Carpenter said nothing but
'Cut us another slice:
I wish you were not quite so deaf—
I've had to ask you twice!'

'It seems a shame,' the Walrus said,
'To play them such a trick,
After we've brought them out so far,
And made them trot so quick!'
The Carpenter said nothing but
'The butter's spread too thick!'

'I weep for you,' the Walrus said:
'I deeply sympathize.'
With sobs and tears he sorted out
Those of the largest size,
Holding his pocket-handkerchief
Before his streaming eyes.

'O Oysters,' said the Carpenter.
'You've had a pleasant run!
Shall we be trotting home again?'
But answer came there none—
And this was scarcely odd, because
They'd eaten every one."

* LEWIS CARROLL, THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE 66-74 (Shocken Books 1987) (1872).

THROUGH THE LOOKING GLASS AND WHAT THE SUPREME COURT FINDS THERE: THE POLITICAL SETTING OF *UNITED STATES v. FORDICE*

John Quincy Adams[*]

'The time has come,' the Walrus said,
'To talk of many things:
Of shoes— and ships— and sealing wax—
Of cabbages— and kings—
And why the sea is boiling hot—
And whether pigs have wings.'
We'll sit and chat of times gone by,
And visit with the queens
Brown, and *Sweatt*, and *Meredith*
Not to mention the fertile *Green*
And then we'll see why *Ayers* should fly
And how equality is king![1]

Judge Goldberg's rendition of Lewis Carroll's well-known verse sums up the task courts encounter in determining whether Mississippi's system of public higher education violates the Equal Protection Clause of the United States Constitution. As his poetry suggests, much has happened during the

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[*] Associate Professor of Political Science, Millsaps College; member, State Bar of Texas. The author thanks Carmen Castilla, Janet Hall, Laura Lillard, David Loper, Nick Verde, Randy Dukes, Anna Lynn Screpetis, Richard Weiss, and Meg Turner for their research and student papers over the years.

[1] Ayers v. Allain, 893 F.2d 732, 733 (5th Cir. 1990) (quoting LEWIS CARROLL, THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE, Chapter IV, Tweedledum and Tweedledee (1872)). The style of the initial lawsuit was *Ayers v. Waller*, [hereinafter *Ayers* when used in its composite sense] and the defendant was the incumbent Governor at the time (1975). *Ayers*, 893 F.2d at 733.

almost forty years that have passed[2] since *Brown v. Board of Education*.[3] The constitutional and legal issues affecting higher education are presented later in this issue. However, Mississippi's story really begins at least as early as *Plessy v. Ferguson*[4] in 1896, so one must also examine the other side of the "Looking-Glass."

Although *Plessy* said "separate but equal," Mississippi did not even give lip service to racial parity in any facet of life. The discriminatory treatment of blacks in the public schools that began in 1896[5] continued long thereafter.[6] For example, from 1952 to 1954, two years prior to *Brown*, only 15.7% of total higher education funds were disbursed to black institutions even though the state's total black population exceeded forty-five percent.[7]

The U.S. Supreme Court's higher education cases, beginning in 1937 and leading up to *Brown*, apparently had no impact on state spending patterns. However, the erosion of "separate but equal" did not go unnoticed in the Mississippi Legislature. In the 1952 Session, the Legislature created a special recess committee to study both educational reform and ways to meet the prospect of an overruling of *Plessy*.[8] At a 1953 special session called to respond to the committee's recommendation, Governor Hugh White pointedly urged for a massive overhaul of public education. He urged that reform include an

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[2] This period would qualify *Ayers* for another literary metaphor, that of Charles Dickens' *Bleak House*, a novel with the setting of a lawsuit lasting four decades.

[3] 347 U.S. 483 (1954).

[4] 163 U.S. 537 (1896).

[5] STUART G. NOBLE, FORTY YEARS OF THE PUBLIC SCHOOLS IN MISSISSIPPI 28 (1918). The Mississippi Constitution of 1869, drafted by the famous "Black and Tan Convention," established a public school system that was not segregated. *Id.* However, despite the framers' intentions, school districts began building separate schools for "whites" and "coloreds." *Id.*

[6] WALTER LORD, THE PAST THAT WOULD NOT DIE 26 (1965). For example, in the 1928-29 school year, the state supplied Bolivar County with roughly $99,368.28 to aid Negro schools. *Id.* However, the Board of Education for Bolivar County diverted over $50,000 of this funding to the white schools. *Id.*

[7] JOHN E. BREWTON, INSTITUTIONS OF HIGHER LEARNING, HIGHER EDUCATION IN MISSISSIPPI (1954).

[8] 1952 MISS. LAWS 453, at 737.

upgrading of black schools to reach parity with white schools in hopes that the U.S. Supreme Court would, somehow, merely insist on true equality if there was still separation.[9] No mention was made of the state's need to correct inequality in higher education. The Legislature did approve extensive consolidation and change, and also provided funds for construction to begin, among other things, making black schools equal in physical plant to white schools.[10] While these events show the State's willingness to spend money to avoid integration, the following information illustrates its unwillingness to spend money to implement integration. A later discussion will analyze the extent of this pattern in the *Ayers* case.

Reaction a year later to *Brown* by Mississippi's public leaders focused on maintaining segregated elementary and secondary education. Statutory and constitutional impediments to school integration were enacted.[11] However, in higher education, it was business as usual. Indeed, about the time James Meredith began to seek admission to the University of Mississippi (in January, 1961), unequal funding in higher education was still clearly the practice, even considering the fifty-eight to forty-two percent white-black population at the time.

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[9] William F. Winter, *New Directions in Politics, 1948-1956*, *in* 2 A HISTORY OF MISSISSIPPI 140, 150 (R. McLemore ed., 1973).

[10] ROBERT B. HIGHSAW & CHARLES N. FORTENBERRY, GOVERNMENT AND ADMINISTRATION OF MISSISSIPPI 194-97 (1954).

[11] *See* FRANCIS WILHOIT, THE POLITICS OF MASSIVE RESISTANCE 35-36 (1973). The Mississippi Legislature approved a constitutional amendment which allowed the total abolition of public schools if alternative methods of preventing school integration failed. *Id.* at 35. The legislators also authorized local school authorities to close schools under integration orders and provided for tuition grants to children attending private schools. *Id.* at 35-36.

APPROPRIATIONS, 1958-1960[12]

Negro Schools	
Alcorn A. & M.	$ 1,083,790
Jackson State College	$ 1,142,796
Mississippi Vocational	$ 1,040,731
Total	$ 3,267,317
White Schools	
University of Mississippi	$ 4,173,121
Mississippi State	$ 4,136,630
Mississippi Southern	$ 2,565,244
M.S.C.W.	$ 1,416,479
Delta State	$ 996,101
Total	$13,287,575

That unequal funding was still possible stemmed from the way the legal system worked. No case had been filed charging discrimination of any kind in Mississippi. Segregation leaders in the state and elsewhere in the South had already begun a policy of extremely narrow interpretation of the role of precedents, arguing that *Brown* was limited in its effect solely to public school education and solely to the facts of segregation in the Topeka school system. They further contended that lower federal court decisions were not binding anywhere except in the particular jurisdiction served by that court. Under this strategy, state and local officials chose to wait until faced with a judicial order, final on appeal, before doing anything about desegregation in education or any facet of governmental activity.[13] Thus, funding of the state's public colleges could continue to be unequal, and was, and continues even to this

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[12] U.S. COMMISSION ON CIVIL RIGHTS, THE FIFTY STATES REPORT 326 (1961).

[13] *See* JACK GREENBERG, RACE RELATIONS AND AMERICAN LAW 61 (1959) (illustrating both delay tactics of states and enforcement tactics of courts which affected desegregation policies); Louis Lusky, *Racial Discrimination and the Federal Law: A Problem in Nullification*, *in* SOUTHERN JUSTICE 255, 260 (Leon Friedman ed., 1965) (asserting that development of our legal system resulted in courts having excessive discretionary leeway in not enforcing new legal rights).

day, according to the plaintiffs in *Ayers*. Whether this strategy was employed by the state during the *Ayers* era will be examined below.

The federal government did little to implement equality after *Brown* in the remaining years of the 1950's decade. In the executive branch, President Dwight D. Eisenhower said nothing in support of the U.S. Supreme Court's decision.[14] Only when there was a challenge to law and order, in the desegregation of the schools in Little Rock, Arkansas, did he speak and act publicly, and then primarily to federalize the National Guard to prevent disobedience to the Court's decree.[15] In the legislative branch, Congress, unable to pass any civil rights bills since Reconstruction, began to feel constituent pressures outside the South, and finally enacted two very limited laws in 1957 and 1960 dealing with narrow aspects of voting.[16] In the judicial branch, only the lower federal courts were involved in the implementation and extension of *Brown*'s principle of equal protection, and even here there were instances of U.S. District Court refusals to adhere to prece-

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[14] ANTHONY LEWIS, THE SECOND AMERICAN REVOLUTION 46 (1966). Although the Southern leaders were effectively ignoring the *Brown* decision, the executive branch remained silent. *Id.* President Eisenhower did not respond to the "unified southern voice" which actively criticized the United States Supreme Court ruling. *Id.*

[15] *Id.* at 55. On September 4, 1957, Arkansas National Guardsmen and a crowd of whites that opposed integration prevented nine black students from entering Central High School. *Id.* at 48. At a press conference, President Eisenhower's initial response regarding the predicament was that "you cannot change people's hearts merely by laws." *Id.* After Federal District Judge Ronald Davies issued an injunction on September 20 against Governor Fabus, the guardsmen were removed from the school the following Monday. *Id.* at 49. However, a mob gathered outside Central and forced the nine black students to leave. *Id.* When a crowd again gathered outside the school on Tuesday, September 23, President Eisenhower sent federal troops to Little Rock. *Id.* at 55. This was the first time since Reconstruction that federal troops were used in the South to protect the rights of black individuals. *Id.*

[16] *Id.* at 111. The Civil Rights Act of 1957 was designed to empower the Justice Department to bring suits on behalf of black persons denied the right to vote. *Id.* The Civil Rights Act of 1960 was designed to strengthen the 1957 act. *Id.* at 114. One provision allowed federal voting referees to register black persons whenever local officials refused to do so. *Id.*

dent.[17]

By the time the 1960's began, the real impetus for implementation of equality was taking place at the grass-roots level around the nation. Civil rights groups began to challenge segregation in various ways, not just in the courts. Their actions stimulated both the national government and the states.[18] Freedom rides and sit-ins hardened official Southern action but also raised the consciousness of people everywhere, including Mississippi. Black citizens in increasing numbers were willing to put their lives at risk in seeking to exercise their rights.[19] While many chose to do so in the political arena, some agreed to serve as plaintiffs in lawsuits as a way of making equality real.

One of those brave litigants was a Mississippian named James Meredith. He did not challenge the inequality of funding programs among the state's colleges and universities; those issues would arise later in *Ayers*. Rather, Meredith, a black man, sought in 1961 to enroll at the all-white University of Mississippi, a step that marked the slow beginning of the dissolution of the dual system in the state's higher education.[20] Although Meredith is the most well-known black applicant to an all-white Mississippi public university, he was not the first black to attempt to break the color barrier at the state's segregated white colleges. Three had earlier tried. Certain aspects of the attempts of these four are worth noting to see whether there is any similarity to corresponding facets of the *Ayers* case.

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[17] *See* GREENBERG, *supra* note 13, at 61.

[18] *See* LEWIS, *supra* note 14, at 85-103. For example, four black students in Greensboro, North Carolina sat at a Woolworth's counter and asked to be served. *Id.* at 86. Although they were not served, they returned to Wooolworth's after several days and were eventually joined by other students, black and white, and by men and women from the area. *Id.* These sit-ins received national attention and they motivated similar sit-ins in other states. *Id.*

[19] *Id.* at 85-103. Activists were often subjected to threats of and actual bouts with violence. *Id.* While Martin Luther King emphasized non-violent protests, that non-violence was often met with hostility and anger. *Id.* Freedom riders in Montgomery were physically attacked, and freedom riders in McComb, Mississippi arrived to hear a mob of white people shouting, "kill 'em! kill 'em!". *Id.* at 88-91.

[20] JAMES MEREDITH, THREE YEARS IN MISSISSIPPI 54 (1966).

Medger Evers, the Mississippi Field Director of the Mississippi State Conference of the National Association for the Advancement of Colored People (NAACP), was apparently the first black to apply, in January, 1954, to one of the all-white universities - in this instance the University of Mississippi School of Law.[21] In September, after an August meeting with Attorney General J.P. Coleman and the Executive Secretary of the State Board of Institutions of Higher Learning, E.R. Jobe, Evers received notice that his application had been rejected. The excuse given was that he had not complied with the requirement of submitting two letters of recommendation from prominent citizens of his county. Although Evers had indeed submitted letters from two citizens of Newton County, where his family's homestead was and where he had lived most of his life, the Board said his letters should have come from citizens of Bolivar County, where he had lived (but owned no property) the two years prior to his application.[22]

The Board also announced a new regulation governing admission. Applicants to the University of Mississippi "would be required to obtain character recommendations from five alumni of the school, all of whom had been personally acquainted with the applicant for two years."[23] The consequences of this rule - that *white* alumni would have to be found to write letters - would have impact for almost a decade, and play a part in the state's most infamous admission case, *Meredith v. Fair*.[24]

Evers, after consultation with NAACP officials, decided not to pursue the matter.[25] Not until four years later was

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[21] MRS. MEDGER EVERS, FOR US, THE LIVING 100 (1967). Evers had attended Alcorn College for his undergraduate degree. *Id.* at 102.

[22] *Id.* at 118. By the time the Board of Higher Learning made its decision, it was too late for Evers to reapply for the fall term. *Id.*

[23] *Id.* at 119.

[24] 305 F.2d 343 (5th Cir.), *cert. denied*, 371 U.S. 828 (1962). The court held that the "requirements of recommendations, whether from alumni or from citizens generally, attesting to an applicant's good moral character or recommending an applicant for admission, is unconstitutional when, as this case demonstrates, the burden falls more heavily on [black students than on white students]." *Id.* at 351.

[25] EVERS, *supra* note 21, at 119. Instead, Evers went on to work for the NAACP in Jackson investigating racial incidents in Mississippi and the state-wide

there a second black applicant to an all-white state university. In 1958 Clennon King, a professor at Alcorn A.& M. College, sought to enroll in the University of Mississippi Graduate School.[26] Unable to get any alumni to write letters for him, he nevertheless attempted to register in person.[27] Governor J.P. Coleman, Attorney General Joe Patterson, and Commissioner of Public Safety Tom Scarborough met him at the Registrar's office. It is unclear whether or not King was permitted to fill out registration papers. King allegedly created a scene at the Registrar's office by falling to the ground. Governor Coleman maintained that the events following King's entrance were as follows:

> "King continued to make belligerent remarks," Governor Coleman said, "so I told Scarborough to take him off the campus and turn him loose." King said he would come back on campus, even if it caused bloodshed. I was tired of King's publicity antics so I told Scarborough to take him to Jackson, detain him for the night, and give him a lunacy hearing.[28]

King was committed briefly to the state mental hospital and then left the state.[29]

The third black person to seek admission to an all-white state university was Clyde Kennard, who discussed enrollment with the President of Mississippi Southern College (now the University of Southern Mississippi) for several years, beginning in 1956. In the fall of 1959 Kennard's final application was rejected, for blatantly invalid and improper reasons.[30] Upon leaving the campus he was arrested and later convicted

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activities of the White Citizens Councils. *Id.* at 133.

[26] Neil R. McMillen, *Development of Civil Rights*, 1956-1970, *in* 2 A HISTORY OF MISSISSIPPI 154, 161 (R. McLemore ed., 1973).

[27] *Id.* Governor Coleman stated that any black person who would try to attend the University of Mississippi was a "lunatic." *Id.*

[28] ERLE JOHNSTON, MISSISSIPPI'S DEFIANT YEARS: 1953-1973, at 53 (1990).

[29] *Id.*

[30] EVERS, *supra* note 21, at 218. Kennard's final application was rejected for three reasons: (1) lack of a transcript of Kennard's records from the University of Chicago, (2) a "false and fraudulent" medical certificate "indicative of lack of good moral character," and an alleged refusal of the University of Chicago to readmit him. *Id.*

by local officials on concocted driving charges.[31] The Mississippi Supreme Court overturned the conviction two years later, but in the meanwhile Kennard was framed, with the awareness of state and local officials,[32] in a more serious felony, for which he was sent to the state penitentiary.[33]

The story of James Meredith, the fourth applicant, who sought admission to the University of Mississippi, has been well-told,[34] but there are several aspects worth reiterating that are similar to the three earlier cases.

First, is the involvement by a civil rights group on behalf of the applicant. Evers worked closely with NAACP leaders, and their advice influenced his decision not to pursue his administrative and legal options. Neither King nor Kennard were associated with any group. Since they did not seek any legal appeals to the denials of admission, no civil rights groups became involved, although both did receive some legal help for problems involving their applications. Meredith received assistance from the Mississippi State Conference of the NAACP, and soon afterwards from both NAACP's national office and its Legal Defense Fund. There was no personal financial help, but the endorsement of the nation's oldest civil rights organization meant both moral and legal support. With-

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[31] *Id.* at 219. Two constables arrested Kennard as he returned to his car after a meeting with Mississippi Southern officials. *Id.* They charged Kennard with reckless driving and possession of liquor. *Id.*

[32] Jerry Mitchell, *Records: Would-be Student Framed*, THE CLARION-LEDGER (Jackson, Miss.), Sept. 9, 1991, at A1. Zack J. Van Landingham, an agent of the Mississippi Sovereignty Commission, and John Reiter, a college security officer, had discussed possible plans to stop Kennard from enrolling. *Id.* The State Sovereignty Commission was a state funded spy agency created to thwart integration. *Id.* The Commission began monitoring Kennard in 1958 and Mississippi Southern College had also been monitoring Kennard for several years. *Id.*

[33] JAMES W. SILVER, MISSISSIPPI: THE CLOSED SOCIETY 94 (1966). Kennard was convicted as an accessory in the theft of three bags of chicken feed and sentenced to one year's imprisonment for each $3.57 bag of feed allegedly stolen. *Id.* The normal sentence for such a crime was 90 days maximum. *Id.*

[34] *See generally* MEREDITH, *supra* note 20 (narrating life and times of James Meredith); RUSSELL H. BARRETT, INTEGRATION AT OLE MISS (1965) (describing James Meredith story); JACK BASS, UNLIKELY HEROES 172-200 (1981) (same); LORD, *supra* note 6, at 1-4 (same); SILVER, *supra* note 33, at 114-17 (recounting the chronology of Meredith incident).

out its involvement, Meredith might have been completely alone and isolated, and he would certainly have been unable to pay for extensive court costs and attorney fees.

Second, the response of the state to the application of all four ultimately resulted in a corruption of its legal system. Governors, attorneys general, the legislature, and a host of lower elected and administrative officials were willing to use and pervert the law in whatever way was necessary to maintain segregation. With Meredith, the state, in trying to prevent the first successful breech of its many barriers supporting segregation, took extreme measures. Existing law was amended or supplemented to give legal grounds to deny his application. University procedures were ignored or changed for the same purpose. All were transparent efforts to give a legal veneer supporting disobedience to *Brown*'s command.

Third, some of the governmental participants in these events prostituted themselves in the name of segregation and state's rights. That is, they clearly, often admittedly and proudly, ignored judicial, statutory, or administrative requirements independent of any still-existing specific state constitutional or legal provisions mandating segregation. Governor Ross Barnett was the most egregious example. He was the leader of the disobedience in Meredith's case, and for his defiance of federal court orders, was charged with criminal contempt and sentenced to six months in prison.[35] Lesser officials, emulating Barnett's leadership, also did whatever was expected of them to prevent Meredith's enrollment.

Finally, in three of the cases there was considerable governmental involvement exceeding the normal and usual roles of government officials. With King, the personal participation of Mississippi's highest officials set a standard to be followed with even greater intensity for Meredith. Kennard's application was handled at the university level, but community officials obviously were alerted to his precise whereabouts or the

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[35] United States v. Barnett, 330 F.2d 369, 383 (5th Cir. 1963), *certifying questions answered by* 376 U.S. 681 (1964). Ironically, the United States Supreme Court saved Barnett from possibly being the nation's first sitting Governor to serve time for defying court orders because it ruled that Barnett was entitled to a jury trial in criminal contempt proceedings. *Id.*

arrests could not have been made. With Meredith, it seems the entire state law enforcement apparatus, much of the Attorney General's staff, and a host of other administrative personnel were involved for more than a year in trying to keep Meredith from enrolling. And for the first time, the federal government got involved, not just in the judiciary, but in the executive branch as well.

The federal law enforcement support necessary to insure Meredith's safety during his enrollment at the University of Mississippi was extraordinary. The real threat of widespread violence required a sufficient force to maintain order. In addition to the 541 regular and special U.S. Marshals called in to be present at the time of Meredith's appearance on campus,[36] there was extensive military involvement. President Kennedy ordered over 11,000 Mississippi National Guardsmen to report to their duty stations, with 2700 sent to Oxford. The maximum number of Regular Army troops deployed totaled about 20,600, with about 12,000 actually in the Oxford area.[37] To ensure there was no further violence, that Meredith's stay on campus would be safe, and that the State of Mississippi would not attempt to remove him from school, regular army soldiers stayed on duty, bivouacked on the campus throughout the spring and into the summer, dwindling to about 250 by the time Meredith graduated in August, 1963.[38]

For a few years after Meredith's admission, there was little activity in the desegregation of higher education on Mississippi. A few blacks broke the university color barrier in other Southern states but the most important development occurred in Washington, D.C.: the enactment of the Civil Rights Act of 1964.[39] Although specific mention was made of

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[36] LORD, *supra* note 6, at 186. In addition to the 123 regular U.S. Marshals, 316 Border Patrolmen and 97 deputized prison guards were called in to ensure Meredith's safety. *Id.*

[37] PAUL J. SCHEIPS, Histories Division, Office of Chief of Military History, Department of the Army (OCMH Monograph No. 73M), THE ROLE OF THE ARMY IN THE OXFORD, MISSISSIPPI INCIDENT: 1962-1963 147 (1965).

[38] BARRETT, *supra* note 34, at 213, 219. On June 11, 1963, the remaining 250 troops moved from their campus quarters to a camp located south of Oxford. *Id.*

[39] Pub. L. No. 88-352 (codified as amendment at 42 U.S.C. § 2000(a) *et seq.*

higher education by the law, there was a differentiation between it and public schools. Title IV, labeled Desegregation of Public Education, emphasized public schools, with the principle reference to public colleges enabling the U.S. Attorney General to bring suit upon a complaint that a student had been denied admission or had not been permitted to continue because of race, color, religion, or national origin.[40] No provisions dealt with the existence or operation of a dual system, although, of course, *Brown* mandated the end of racially separate schools.

The significance of the Civil Rights Act of 1964 lies in Title VI - Nondiscrimination in Federally Assisted Programs. At the time of the Act's passage, probably all public colleges in the nation received some sort of federal assistance, primarily in the form of research grants from a variety of federal programs. Few public schools in the nation received federal aid then, but the enactment in 1965 of the Elementary and Secondary Education Act (ESE)[41] changed that drastically. Once the ESE began to fund school districts (and nearly all districts throughout the nation soon got grants), it became apparent to the Department of Health, Education, and Welfare (HEW) that Title VI of the 1964 Act would have to be invoked, particularly in the South.

The vast number of public school federal aid recipients, the focus of the media and the citizenry on school desegregation suits and incidents at this time, and the limitations of the bureaucracy in HEW meant that the implementation of Title VI would first be applied to public school districts, not higher education. HEW's Office of Civil Rights (OCR) thus initially ignored the dual systems of black and white colleges that still functioned as though *Brown* meant freedom of choice and nothing else.

(1988)). *Author's Note*: This cite is to the public law, and not to U.S.C., because the statute as it historically existed, not as presently found with amendments, is the focus of the text.

[40] *Id.* § 407(a).

[41] Elementary & Secondary Education Act of 1965, Pub. L. No. 89-10 (codified as amended at 20 U.S.C. §§ 236-44, 331-32(b), 871-72, 841-48, 861-70, 881-85 (1988)).

When freedom of choice was found wanting, first in 1967 in the Fifth Circuit's ruling in *United States v. Jefferson County Board of Education*[42] and in the 1968 U.S. Supreme Court ruling in *Green v. County School Board*[43], HEW slowly began insisting that school districts take meaningful steps to dismantle their dual systems. About the same time, HEW finally turned to higher education. Officials began to gather information about the segregative status of public colleges and universities.

In early 1969, when statistics revealed that segregation still prevailed, OCR requested Louisiana and Arkansas to submit desegregation plans or face the loss of federal funds. Maryland and Mississippi came next, and Pennsylvania shortly thereafter. Mississippi was notified by HEW in March, 1969, that it must submit a plan of desegregation within 120 days. The state made no response within the time period. Ignoring the request was but one instance of a recent strategy stemming from the failure of Massive Resistance, a strategy of business as usual as though new federal requirements meant nothing.[44] HEW requested plans from nine other states. Five at least responded (although their plans were unacceptable), but four obstinate states, including Mississippi, did nothing. In spite of their ostrich-like non-compliance with Title VI, HEW did not cut off funds to these four states.

Many civil rights activists had long felt dismay at the lack of meaningful integration of higher education. Doubtful about forceful leadership from President Nixon, unhappy with the slow pace of OCR in dealing with public schools, and unwilling

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[42] 372 F.2d 836, 889-90 (5th Cir. 1966), *reh'g granted*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967). The court found that freedom of choice plans may be invalid because "freedom of choice" was illusory. *Id.* at 889. The court determined that schools which implemented freedom of choice plans tended to retain their racial identification. *Id.*

[43] 391 U.S. 430, 441-42 (1968). The Court held that the "freedom-of-choice" plan cannot be accepted as a sufficient step to "effectuate a transition" to a unitary system. *Id.* at 441.

[44] For example, for at least four years after the enactment of the federal Voting Rights Act of 1965, Mississippi did not submit to the Justice Department a single piece of state or local legislation affecting voting as required under Section 5 of the Act. FRANK PARKER, BLACK VOTES COUNT 181 (1990).

to accept the delays in higher education, the NAACP Legal Defense Fund sought to force Title VI's implementation by bringing suit on October 19, 1970, against the Secretary of Health, Education, and Welfare to require him to cut off federal funds both to higher education and to public schools that were still segregated. *Adams v. Richardson*[45] was brought against a Cabinet officer, thereby giving the case prominence and a likelihood of success, compared to bringing ten suits in ten different states against state officials still resisting desegregation. Furthermore, by being filed in the District Court for the District of Columbia, the case would be heard in a sympathetic venue; separate suits in the South faced the potential of being heard by recalcitrant federal judges.

Bureaucratic delay was matched by judicial delay; the plaintiffs returned to court a year later, in December, 1971, and sought a summary judgement. There was still more delay, a harbinger of things to come, for Judge John H. Pratt did not hand down a ruling in *Adams* until February 16, 1973.[46] Judge Pratt basically agreed with the plaintiffs and gave HEW 150 days to report to him on the compliance steps it had taken. The defendant, by this time a new Secretary, appealed. In one of the speediest stages to that date, the court of appeals, on June 12, 1973, upheld the substance of Judge Pratt's opinion.[47] However, HEW was given more time, until April, 1974, to report on compliance.

Just a week prior to the court of appeals ruling, Mississippi, who like Lord Byron's Julia in *Don Juan* had said "I shall ne'er consent," consented. On June 7, 1973, Mississippi submitted its first Plan of Compliance. By this time other setbacks associated with clinging to "the Southern Way of Life" made the political leadership of the state realize that silence would be as unsuccessful as open defiance, and perhaps counterproductive as well. Nevertheless, the proposals were rather general, still emphasized freedom of choice, and had been drawn up without any black input. HEW rejected the Plan on

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[45] 356 F. Supp. 92 (D.D.C.), *modified*, 480 F.2d 1159 (D.C. Cir. 1973).
[46] *Adams*, 356 F. Supp. at 92.
[47] Adams v. Richardson, 480 F.2d 1159, 1166 (D.C. Cir. 1973).

November 10, 1973.[48] After a year of negotiations and resubmissions, HEW in June, 1974, finally found acceptable Mississippi's plan of May 28, 1974 (as amended June 14, 1974), pertaining to four-year institutions. Still to be settled was a plan ending segregation in the junior colleges of the state. Since compliance with Title VI required an approved plan for the entire system of higher education, and since the junior colleges could not all agree to a comprehensive plan, HEW referred the Mississippi situation to the Department of Justice (DOJ) in August, 1974, for enforcement action.

Activity outside government during this same time period was also taking place and would have a profound impact on the struggle for desegregation. This activity came about because Mississippi still seemed to be last in ending segregation during the early 1970's. Of the original ten states included in the *Adams* suit, all but Louisiana and Mississippi had begun some desegregation in working with HEW. This lack of progress led about two dozen black activists in Mississippi to get together in the spring of 1972 to exchange information about the status of Mississippi's response to HEW and the suit before Judge Pratt. They formed the Black Mississippians' Council on Higher Education (hereinafter the Council).

In March, 1974, the DOJ brought suit against Louisiana. This meant Mississippi was the last of the ten *Adams* states without meaningful progress. The Council, upon evaluation of Mississippi's third plan of Compliance (still pending before HEW in the spring of 1974), felt that the plan did not address the root existence of racism, and it doubted HEW acceptance. The Council thus submitted its own plan to HEW on May 31, 1974. Nevertheless, just days later, HEW announced its approval of the senior college portion of the Mississippi Plan.

The referral by HEW to the DOJ in August, 1974, resulted in no visible action for the remainder of the year, perhaps because of preoccupation with Watergate and its aftermath. The DOJ did consider entering an already existing case in order to attack the state's higher education segregation. In

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[48] Letter to Dr. Thomas Turner, IHL President, from Peter Holmes, Director of OCR, HEW (Nov. 10, 1973) (on file with the author).

1970 the Lawyers Committee for Civil Rights Under Law, a Washington based civil rights attorneys group with a vigorously active Jackson office, brought suit to force the U.S. Agricultural Extension Service to desegregate.[49] The Extension Service was a branch of two of the state's land grant colleges, Mississippi State University and Alcorn A. & M. University, which were included as defendants. The Service was funded in part by the U.S. Department of Agriculture which was also named as a defendant. Although the decision in *Wade* was handed down in 1974, the case remained active in order that implementation of the decree could be monitored. In mid-February, 1975, the DOJ filed a petition to enter the case as a plaintiff (thereby being on both sides at the same time).[50] It sought to reopen the suit and expand the focus to include both the senior and the junior colleges, thereby hoping to kill two unconstitutional birds with one judicial stone.[51]

The Council, at that time, was apparently unaware of DOJ plans to enter *Wade*. Unwilling to let the DOJ get judicial ratification of HEW's accepted solution to the senior college system of segregation, the Council decided to bring suit itself. On January 28, 1975, a few days after the DOJ sought intervention in *Wade*, the Council filed *Ayers v. Waller* as a class action suit and invoked a three-judge district court. The alphabetically first member of the Council then, Jake Ayers, became the lead plaintiff's well-known name, and Governor William Waller became the first in a succession of governors to be designated the lead defendant. Also named as defendants were the heads of all the state colleges, the administrative agencies of the state for higher education including the Board of Trustees for the Institutions of Higher Learning (IHL) responsible for senior colleges, the Department of Edu-

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[49] Wade v. Mississippi Coop. Extension Serv., 372 F. Supp. 126, 129 (N.D. Miss.), *modified*, 378 F. Supp. 1251 (N.D. Miss. 1974), *vacated*, 528 F.2d 508 (5th Cir. 1976).

[50] *U.S. Would Hasten College Mixing Case*, THE CLARION-LEDGER (Jackson, Miss.), Jan. 21, 1975, at A1. By entering the case, the Justice Department planned to expedite the decision and to force the judge to address the entire system of racially segregated universities. *Id.* at A12.

[51] *Id.*

cation and the Junior College Commission, responsible for junior colleges.

The filing of *Ayers* by a private group meant that its suit, including arguments, analysis, and relief sought, were not controlled by Mississippi's Plan of Compliance that HEW had approved. The momentum of desegregation and its definition had switched from the national and state government to the plaintiffs, a factor that would significantly affect the outcome of the case by shifting the burden of response.

Response at the national level required a decision concerning the best forum for the DOJ to represent the United States. That determination came about a few months later on April 25, 1975, when the DOJ sought involvement in *Ayers* as a plaintiff-intervenor. About the same time, the DOJ withdrew its attempt to use *Wade* as the means of pursuing the interests of the federal government in ending segregation throughout the higher education system. At the state level, Mississippi found itself challenged by two differing theories of implementation, meaning it had to prepare a defense to both. Meanwhile, IHL decided to go forward with its HEW-approved Plan of Compliance for senior colleges as a means of showing good faith and as a strategy to convince the court that meaningful integration would be taking place.

The implementation of the Plan could be accomplished in part without a need for additional expenditures. IHL put into effect several administrative aspects of the Plan immediately and directed the colleges to take other applicable steps on their campuses. However, there was no authoritative supervision of implementation simply because neither a court nor HEW had formally approved the Plan. This meant IHL itself had to monitor those aspects of the Plan that were not to be carried out on individual campuses. Despite changes reported by some institutions, the district court later acknowledged these changes as cosmetic only. For example, a white hired to fill a new slot as a minority admissions counsellor at predominantly-black Jackson State University spent nearly all of her time recruiting blacks, not whites, during her period of em-

ployment from 1978 to 1981.[52] And although predominantly-white colleges were not to offer extension courses at the Mississippi University Center in Jackson that duplicated those offered on-campus at Jackson State, for many years that prohibition was often evaded by careful crafting of some titles and descriptions to make it appear that the courses were not the same.[53]

Other parts of the Plan required funds beyond those regularly appropriated for the operation of the senior colleges. A provision of IHL's second Plan of February 8, 1974, promised to seek a total of almost $3,000,000 from the Legislature in 1974-1975 to help carry out the Plan's objectives. This sum was requested a few days after the Plan's proposal though no response had yet been received from HEW.[54] The Legislature, however, waited three years to fund IHL's Plan and then appropriated only $880,000.[55]

After the filing of the suit in 1975, twelve years passed before the district court's trial of the case began on April 27, 1987. Data gathering, discovery, diplomacy, and modest desegregation took place during the period, but the main issues of the case could not be consensually resolved. Nevertheless, the patterns of action (and non-action!) evident for a dozen years may be compared with those leading up to *Ayers*. Further, these patterns may be instructive to predict what might happen should the U.S. Supreme Court grant all or partial relief.

Earlier in this article the attempts of Evers, King, Kennard, and Meredith to enter all-white de jure segregated universities were shown to reveal four significant elements. The first element pertained to the extent of involvement by a civil rights group. Only Meredith received significant support from the NAACP and its Legal Defense Fund. In *Ayers*, the

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[52] Personal knowledge of the writer.

[53] *Id.*

[54] Bill Pardue, *State Plan Supported by Freedom of Choice*, JACKSON DAILY NEWS, (Jackson, Miss.), Feb. 11, 1974, at A1. The College Board president estimated that overall, the State would need $50 million to implement the entire program by the target year of 1980. *Id.*

[55] MISSISSIPPI BOARD OF TRUSTEES OF THE STATE INSTITUTIONS OF HIGHER LEARNING, 1977 ANN. REP. 14.

only private group involved was the Black Mississippians' Council in Higher Education. The Council had no former affiliation with any existing national or state civil rights organizations, although many council members as individuals had ties to these groups. As a new, ad hoc group, the Council had no national office and also no treasury, and thus no substantial financial resources to undertake costly enterprises. There were some actions the Council had taken that required new funds, such as the admission of its own Plan to HEW, but the prosecution of a major lawsuit was a daunting prospect. Fund-raising efforts brought financial aid from individuals and national civil rights legal groups. Soon after *Ayers* commenced, ongoing funding was provided by North Mississippi Rural Legal Services by helping underwrite the salary of one of its staff, the new (and present) lead attorney for the Council, Alvin Chambliss. Without this significant support, the DOJ's interpretation of what Title VI required would likely have dominated the case against Mississippi.

The second element of the four prior instances was a state response so intensively defiant that its legal system was corrupted. This element is not evident in *Ayers*. IHL did not concoct highly dubious new rules and regulations to thwart the plaintiffs, nor did the Legislature enact laws designed to place barriers in their path. Likewise, officials of state agencies and colleges refrained from taking action separate from the State's collective legal response to the suit.

The third element noted the clear prostitution of the Rule of Law by some state leaders in defending segregation. This element is also not present in *Ayers*. No officials have been threatened with contempt of court, no obvious disobedience has taken place. The press reported no vehemence or vituperation.

The fourth element pertained to the extensive governmental involvement beyond normal and usual roles. The very nature of desegregating a large higher education system is quite complex. The mandates of HEW and the response required to *Ayers* meant great effort had to be made to present the State's positions, an effort that was not unusual under these circumstances. Furthermore, no law enforcement presence of any

kind has been necessary during any stages of the cases, and, it would be highly unlikely it will be necessary in the future, either.

There are other patterns as well. These stem from a period in the civil rights struggle later than the admissions incidents. Silence, as non-response, in the face of obvious administrative obligation was a strategy used when HEW originally sought a Plan of Compliance in 1969, but it was abandoned about the time Judge Pratt handed down the *Adams* decision. From 1973 to the present, Mississippi's officials, while they seem more like the tortoise than the hare, have at least been in the race.

Another characteristic is delay. While non-response naturally brought delay, that does not account for the hiatus of twelve years from filing the case to the trial. To be sure, the complexity of the case partly explains the long drawn-out process. But other factors probably had an impact as well. The final resolution of many issues in other Southern state higher education desegregation suits was awaited by both sides at various times to determine if judicial precedents in those cases might be advantageous to their arguments.

It is unlikely that any of these elements and patterns will re-appear should the United States Supreme Court remand the case to the district court to fashion specific remedies. In that situation there are two more important factors that arose during the long process from initial HEW involvement that could be significant.

The first factor is the matter of supervising the implementation of the decrees. When IHL decided to carry out the senior college Plan on a voluntary basis, strict adherence to its provisions soon diminished and many goals were far from reached, as both courts found out in *Ayers*. If remedies are required, they are sure to be complex. While the court itself can elect to oversee the implementation, as was done in the Mississippi penitentiary case, *Gates v. Collier*,[56] this would require that reliance—and trust—be placed on state agencies

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[56] 349 F. Supp. 881, 896 (N.D. Miss. 1972)., *modified*, 390 F. Supp. 482 (N.D. Miss. 1975).

and college officials. IHL's past so-so record is not a good omen for this method of implementation. It would be more efficient for a Master to be appointed for this task, as was done in the Mississippi malapportionment and redistricting cases of the past twenty-five years. The Master's work would be open to public scrutiny, and both progress and accountability would be easily monitored.

The second factor is money. While it is pure conjecture to discuss the extent of costs of implementing possible remedies, it is safe to assume that public funds will be necessary. While the state was willing to spend considerable monies in the early 1950's to forestall school desegregation efforts, and while the state spent money freely to fight Meredith's admission, the state was not willing to fully grant IHL's request for $3,000,000 to begin implementing the senior college Plan. Indeed, the Legislature has been consistently near-defiant in appropriating funds to satisfy federal judgments for attorneys fees in civil rights cases the state has lost.[57] Further complicating matters, the difficult economic times of the 1990's has already seriously affected all state budgetary decisions. Requests for additional appropriations to achieve court-ordered desegregation could bring new crises.

The outcome of *Ayers* is unknown at this writing. The United States Supreme Court could accept the status quo, thereby ending judicial and administrative controversy. Or the Court could require a massive overhaul of the state's higher education system, thereby guaranteeing more years before final resolution. Or the Court's holding might fall somewhere in between. No matter what the high court rules, the progress in integrating all of Mississippi's institutions is more dependent upon its people and their representatives. Judicial holdings set guidelines, but only the citizenry can see these guidelines fully realized.

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[57] Patrick Larkin, *State Must Pay $73,000 in Legal Fees*, THE CLARION-LEDGER (Jackson, Miss.), Jan. 27, 1979, at A1. Civil Rights attorneys were forced to file suit to collect their court awarded fees because of the false claims of state officials that state law barred them from making payments. *Id.*

THE ROAD TO *UNITED STATES v. FORDICE:* WHAT IS THE DUTY OF PUBLIC COLLEGES AND UNIVERSITIES IN FORMER *DE JURE* STATES TO DESEGREGATE?

Mary Ann Connell[*]

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I. INTRODUCTION

Throughout the former *de jure* segregated states, there still exist public colleges and universities easily identifiable by race as being predominantly white or predominantly black institutions. In almost all cases, the current racial identifiability reflects the historical creation and existence of the higher education institutions as being for "black students" or for "white students." In all of these public institutions, former racially-exclusive admission and hiring practices and procedures have been abolished. In some cases, many millions of dollars have been expended toward the goal of achieving a higher level of integration, and yet still many vestiges of former segregation linger and seem to elude breakdown.

Sharp disagreement exists over the scope of the duty a state, which at one time operated by law a racially segregated system of public higher education, has to eliminate all traces of the former dualism and achieve a unified, integrated system of colleges and universities. Some say the duty is the same at the higher education level as in elementary/secondary schools and is the one imposed in *Green v. County School Board*[1] to

[1] 391 U.S. 430 (1968).

"take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[2]

Others maintain that there are significant differences between educational institutions at the post-secondary level and those below, and that the duty to desegregate reflects those differences. Proponents of this view favor the holdings in *Alabama State Teachers Ass'n v. Alabama Public School & College Authority (ASTA)*[3] and *Bazemore v. Friday*,[4] and argue that the constitutional obligation to desegregate is satisfied by removing discriminatory barriers to admission and employment and by good faith implementation of race-neutral practices and procedures.[5]

In 1990, the Fifth Circuit Court of Appeals, sitting en banc in *Ayers v. Allain*,[6] held that the standard set forth in *Bazemore* was the appropriate standard by which to measure the desegregation actions of a state with respect to its public higher education institutions.[7] In so doing, the Fifth Circuit affirmed a district court opinion finding that the State of Mississippi had done all it was constitutionally required to do to achieve desegregation of its eight public universities by adopting in good faith racially non-discriminatory admission policies and that any present day racial identifiability of its higher education institutions was the result of free choice of students, not unlawful state action.[8]

The position of the Fifth Circuit in *Ayers* was in direct conflict with that reached by the Sixth Circuit in *Geier v. Uni-*

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[2] *Green*, 391 U.S. at 437-38.

[3] 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd per curiam*, 393 U.S. 400 (1969).

[4] 478 U.S. 385 (1986).

[5] *ASTA*, 289 F. Supp. at 789-90; *see Bazemore*, 478 U.S. at 408 (White, J., concurring) (adopting same proposition with respect to employment).

[6] 914 F.2d 676 (5th Cir. 1990)(en banc), *aff'g*, 674 F. Supp. 1523 (N.D. Miss. 1987), *vacated and remanded sub nom.*, United States v. Fordice, 112 S. Ct. 2727 (1992).

[7] *Ayers*, 914 F.2d at 687.

[8] *Id.* at 692. Finding *Ayers* dispositive of the issue, a Louisiana district court reluctantly vacated an earlier order restructuring the higher education system in that state. United States v. Louisiana, 751 F. Supp. 606, 608 (E.D. La. 1990).

versity of Tennessee (*Geier I*)[9] and *Geier v. Alexander* (*Geier II*).[10] The Sixth Circuit found the mandates of *Green* to be applicable to colleges and universities and declined to find that *Bazemore* had any bearing on education.[11] That court found the duty to desegregate to be as exacting at the higher education level as in elementary/secondary schools.[12] With a decisive split between two circuits on an issue of great importance to seventeen former *de jure* states[13] and with little guidance from the Court as to the scope of the affirmative duty to desegregate at the higher education level, the U.S. Supreme Court granted certiorari on April 15, 1991, to resolve this issue.[14]

This paper addresses in a historical perspective the question presented to the Court in *Ayers*: What is the standard by which a state which operated a former *de jure* segregated system of higher education should be judged in determining whether that state has fulfilled its affirmative duty to desegregate? It will begin by tracing the development of desegregation in the graduate school cases of the 1930s, where the first successful efforts were made to achieve equal protection in the field of education. From there the paper will move through

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[9] 597 F.2d 1056 (6th Cir. 1979), *cert. denied*, 444 U.S. 886 (1979).

[10] 801 F.2d 799 (6th Cir. 1986).

[11] *Geier II*, 801 F.2d at 804-05.

[12] *Id.* at 805.

[13] Pending at the time the petitions for certiorari in *Ayers* were filed was the Alabama higher education desegregation case. The legal question there was the same as in *Ayers*, but was answered by the district court on December 30, 1991, in a manner consistent with the approach of the Sixth Circuit rather than the Fifth Circuit. *See* Knight v. Alabama, 787 F. Supp. 1030 (N.D. Ala. 1991).

[14] United States v. Mabus, 111 S. Ct. 1579 (1991). The announcement by the Court that it would hear the *Ayers* case received two column, front page coverage by *The New York Times*. Linda Greenhouse, *Supreme Court to Review Record on Bias in Mississippi Colleges*, N.Y. TIMES, Apr. 16, 1991, at A1. Similar attention was given the story in other newspapers around the country; *see* Lea Anne Brandon, *Court to Rule on State Universities*, THE CLARION-LEDGER (Jackson, Miss.), Apr. 16, 1991, at A1; Ethel Bronner, *Court Weighs Public College Integration: Extent of States' Duty in Question*, THE BOSTON GLOBE, Apr. 16, 1991, at A3; Mark Mayfield, *Mississippi Suit Questions Equality in Schools*, USA TODAY, Apr. 23, 1991, at A9; Stephen Wermiel, *High Court Agrees to Hear Case on Segregation at State Colleges*, WALL ST. J., Apr. 16, 1991, at B10.

Brown v. Board of Education (*Brown I*)[15] to the period of massive resistance in the Deep South and then to the era of the Supreme Court's impatience and forceful mandate in *Green* to eradicate remaining vestiges of segregation root and branch.

Confusion will appear to have reigned everywhere after *Green*, as indeed it did, as lower courts wrestled with the higher education question with little guidance from the Supreme Court. Note will be taken of summary affirmances of cases in which completely opposite results were reached, until finally in 1986 the Court in *Bazemore* sharply distinguished higher education from elementary/secondary and found that the mandates of *Green* did not apply in the "wholly different milieu" of 4-H and Homemaker Clubs sponsored by the North Carolina Extension Service, a division of North Carolina State University.[16]

All of this uncertainty and confusion peaked when the Fifth Circuit in *Ayers* rejected *Green* as being applicable in the public college/university context and declared *Bazemore* to be the standard,[17] a position in stark contrast to that taken by the Sixth Circuit. This paper will conclude with a summation of the arguments on behalf of the competing standards of *Green* and *Bazemore*, the standards forcefully argued by the parties in *United States v. Fordice*.[18]

II. The Road to *Brown*: The Graduate School Cases

Prior to *Brown I*, the United States Supreme Court heard six cases involving the "separate-but-equal" doctrine[19] in the

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[15] 347 U.S. 483 (1954).

[16] *Bazemore*, 478 U.S. at 408.

[17] *Ayers*, 914 F.2d at 686-87.

[18] 112 S. Ct. 2727 (1992).

[19] *See* Plessy v. Ferguson, 163 U.S. 537 (1896). A Louisiana statute requiring that all railway companies provide "equal but separate accommodations" for black and white passengers was upheld against a Fourteenth Amendment equal protection challenge. *Id.* at 549. The Court held that the enforced separation of the races did not mark the black race with a badge of inferiority, that social prejudice could not be overcome by law, and that the object of the Fourteenth Amendment was to enforce equality of the two races before the law, not to abolish dis-

field of public education.[20] Four of these cases dealt with higher education at the graduate or professional school level. Inequality was found in each case because there were specific benefits enjoyed by white students which were denied to black students with the same educational qualifications. The Court, therefore, did not find it necessary to re-examine the separate-but-equal doctrine to grant plaintiffs the requested relief.[21]

A. Missouri ex rel. Gaines v. Canada

The first of the four pre-*Brown I* higher education cases was *Missouri ex rel. Gaines v. Canada*[22] in 1938. *Gaines* presented the Court with the issue of whether the state of Missouri's providing funds for its black residents to receive a law school education in other states, while denying their admission to its own law school, was sufficient to satisfy the constitutional requirement of equal protection.[23]

Lloyd Lionel Gaines, a twenty-five year old black resident of St. Louis and graduate of Missouri's state supported black college, Lincoln University, was refused admission to the School of Law at the University of Missouri on the basis of state policy prohibiting the attendance of blacks and whites at the same educational institution.[24] Neither Lincoln University nor any other publicly supported university in Missouri pro-

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tinctions based upon color or enforce social, as distinguished from political equality. *Id.* at 551. *See generally* JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 627-29 (2d ed. 1983) (addressing "separate but equal" doctrine and its limitation).

[20] McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629, *reh'g denied*, 340 U.S. 946 (1950); Sipuel v. Board of Regents, 332 U.S. 631, *mandamus denied sub nom.*, Fisher v. Hurst, 333 U.S. 147 (1948); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938), *reh'g denied*, 305 U.S. 676 (1939); Gong Lum v. Rice, 275 U.S. 78 (1927); and Cumming v. Board of Educ., 175 U.S. 528 (1899).

[21] *Brown I*, 347 U.S. at 492. *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1475 n.11 (2d ed. 1988) (Several decisions prior to *Brown I* struck down racial graduate school segregation without explicitly examining the "separate but equal" doctrine).

[22] 305 U.S. 337 (1938), *reh'g denied*, 305 U.S. 676 (1939).

[23] *Gaines*, 305 U.S. at 348.

[24] *Id.* at 342-43.

vided instruction in law for blacks.[25] The state, however, had a statute which authorized the payment of tuition for any black resident of Missouri to attend law or graduate school at the state university of any one of four adjoining states which would accept black students.[26] This offer was available to Gaines, but he did not choose to accept it.[27]

Gaines brought suit, seeking a writ of mandamus against the registrar at the University of Missouri, S. W. Canada, contending that the denial of his admission to the University of Missouri was an abridgement of his fundamental right of equal protection.[28] The state maintained that it had fulfilled its separate-but-equal obligation by making available to Gaines facilities for a legal education in other states which were substantially equal to those afforded white students at the University of Missouri School of Law.[29]

The adjacent state tuition payment plan was upheld by the Missouri Supreme Court, which stressed the advantages afforded by the law schools of the adjacent states.[30] The United States Supreme Court found any such advantages to be beside the point, because "[t]he basic consideration is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color."[31] In reversing, the Court held that Missouri's out-of-state tuition grants for black students were not the equivalent of in-state instruction for white students and did not satisfy the constitutional requirement of equal protection.[32]

In legal terms, *Gaines* did little more than affirm that the

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[25] *Id.* at 345.

[26] *Id.* at 342-43. Schools of law in connection with the state universities of the four adjacent states of Kansas, Nebraska, Iowa and Illinois would admit nonresident black students. *Id.*

[27] *Id.* at 343.

[28] *Gaines*, 305 U.S. at 342.

[29] *Id.* at 344.

[30] *Id.* at 348.

[31] *Id.* at 349.

[32] *Id.* at 349-50.

separate-but-equal doctrine meant what it said and forced the State of Missouri to provide a law school education for both races within the borders of the state. The decision did not preclude the establishment of separate law schools for blacks and whites. Choosing that alternative, the Missouri legislature quickly appropriated $200,000 to Lincoln University to create a Jim Crow law school for the education of black students.[33]

Despite the outcry in the black community, approximately thirty students enrolled in the hastily assembled law school in September 1939.[34] Housed along with a movie theater and hotel in the former site of a cosmetic school, Lincoln's law school fell far short of the one at the University of Missouri.[35] The Missouri Supreme Court sent *Gaines* back to the circuit court for a judgment on the question of equality of facilities.[36] The unexplained disappearance of Lloyd Gaines abruptly halted this second round of litigation and left for another day the still unresolved question of the constitutionality of the separate-but-equal doctrine.[37]

Even though *Gaines* did little legally except to emphasize the "equal" in the separate-but-equal doctrine, its symbolic support of the rights of black citizens and of the Supreme Court's intention of upholding them was extremely important to the civil rights community. Encouraged by growing public awareness of the race issue and by Gunnar Myrdal's powerful attack in 1944 upon the moral rectitude of the United States in tolerating the continued existence of segregation,[38] the NAACP[39] readied itself for its next higher education case, *Sipuel v. Board of Regents*.[40]

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[33] JEAN LYON PREER, LAWYERS V. EDUCATORS 53 (1982).

[34] Gil Kujovich, *Equal Opportunity in Higher Education and the Public College: The Era of Separate But Equal*, 72 MINN. L. REV. 29, 118-19 (1987).

[35] *Id.*

[36] State v. Canada, 131 S.W.2d 217, 220 (Mo. 1939).

[37] PREER, *supra* note 33, at 54.

[38] GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY at xix (1944).

[39] Since the early 1930s, the National Association for the Advancement of Colored People (NAACP) had taken the leadership role in attacking segregation and had focused its attack to a large degree on the desegregation of public graduate and professional schools. RICHARD KLUGER, SIMPLE JUSTICE 282 (1975).

[40] 332 U.S. 631, *mandamus denied sub nom.*, Fisher v. Hurst, 333 U.S. 147

B. Sipuel v. Board of Regents

Ada Lois Sipuel, a twenty-one-year-old honor graduate of Langston, Oklahoma's higher education institution for blacks, had been denied admission to the University of Oklahoma School of Law solely because of her color.[41] Since the University's law school was the only publicly supported law school in the state, Sipuel sought a writ of mandamus to compel her admission.[42] Mandamus was denied and appeal was taken to the United States Supreme Court.[43]

In the brief on the merits, Thurgood Marshall, counsel since 1936 for the NAACP Legal Defense Fund representing Sipuel, called upon the Court for the first time to reexamine the constitutionality of the separate-but-equal doctrine.[44] Foreshadowing the use of social science evidence in *Brown*, he incorporated the findings of the President's Committee on Civil Rights, the works of Gunnar Myrdal, and that of other researchers to support the contention that there was no rational justification for segregation in higher education.[45] The brief also argued that segregation itself established a feeling of humiliation, deprivation and inferiority totally incompatible with the social role of education and in conflict with the fundamental egalitarianism of the American way of life.[46]

On January 12, 1948, only four days after oral argument, the Court handed down its decision in a three paragraph per curiam opinion.[47] Relying exclusively on *Gaines*, the Court ordered the State of Oklahoma to provide Sipuel a law school education "in conformity with the equal protection clause of the Fourteenth Amendment."[48] The Court did not specifically

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(1948).

[41] *Sipuel*, 332 U.S. at 632.

[42] *Id.*

[43] *Id.*

[44] PREER, *supra* note 33, at 76-77.

[45] *Id.*

[46] *Id.*

[47] *Sipuel*, 332 U.S. at 631-33.

[48] *Id.* at 633.

order that she be admitted to the University of Oklahoma Law School, although it was the only law school in the state, but sent the case back to the state supreme court to act upon its order.[49]

Upon remand, the Oklahoma Supreme Court directed university authorities to either admit Sipuel to the white law school, open a separate one for her, or suspend the white law school until it saw fit to open one for blacks.[50] Consequently, the Oklahoma Board of Regents quickly assigned three white law professors to instruct Sipuel in several roped-off rooms in the state capitol, while it hurriedly began to implement steps to establish a law school for black students at Langston.[51]

When Sipuel returned to court to complain that the creation of a one-student, overnight special law school with totally inadequate facilities was an act of defiance of the Court's mandate, the Court announced that the issue of equality of facilities was not properly before it and upheld the right of the State of Oklahoma to create a separate law school for black students.[52] The new law school at Langston was in operation for eighteen months, during which time only one student attended.[53] After the black school closed in 1949, Sipuel was admitted to the University of Oklahoma Law School from which she graduated in 1951.[54]

The decision in *Sipuel* created a dilemma for black leaders and educators. While *Gaines* had spawned the creation of new separate schools for blacks, which achieved the goal of better educational opportunities, the very creation of these separate facilities proved to be a set-back for the more important goal of removing the legal barrier of segregation. *Sipuel*, on the other hand, made possible the continuation of the separate

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[49] Tracy Miller, Comment, *Desegregation and the Meaning of Equal Educational Opportunity in Higher Education*, 17 HARV. C.R.-C.L. L. REV. 555, 567 (1982).

[50] *Id.*

[51] KLUGER, *supra* note 39, at 259.

[52] Fisher v. Hurst, 333 U.S. 147, 147-51 (1948). After her marriage, Ada Sipuel became Ada Fisher.

[53] MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 123 (1987).

[54] *Id.*

aspect of the separate-but-equal doctrine. As long as the creation of separate programs for blacks satisfied the Equal Protection Clause, both legal rights and educational opportunities for blacks remained in an uncertain and unsatisfactory condition.[55]

C. *Sweatt v. Painter*

Subsequently, the Court issued two simultaneous opinions which significantly undermined the separate-but-equal doctrine in the context of higher education. In *Sweatt v. Painter*,[56] the Court reviewed a situation in which the University of Texas Law School denied admission to Heman Marion Sweatt, a black mailman, solely because of his race.[57] Sweatt filed suit in state court seeking mandamus against school officials to compel his admission.[58] The trial court found that the State violated Sweatt's constitutional right of equal protection by denying him a legal education, but nonetheless denied relief.[59] The court chose instead to continue the case for six months to allow the state to hastily create a new law school for blacks at Texas State University.[60] At the end of the six months, the trial court denied Sweatt's writ of mandamus upon a showing by the State that it had provided a law school for black students which Sweatt refused to attend.[61]

Sweatt subsequently appealed, asserting that the two schools were not equal.[62] Finding that the new law school for blacks offered opportunities for the study of law "substantially equivalent to those offered by the State to white students at the University of Texas," the trial and appellate courts in Tex-

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[55] *Id.* at 88.

[56] 339 U.S. 629, *reh'g denied*, 340 U.S. 946 (1950).

[57] *Sweatt*, 339 U.S. at 631. In accordance with state law, the University of Texas was restricted to white students. *Id.* at n.1.

[58] *Id.* at 631.

[59] *Id.* at 631-32.

[60] *Id.* at 632.

[61] *Id.*

[62] *Sweatt*, 339 U.S. at 632.

as denied Sweatt relief.[63] After Sweatt exhausted his appeals through the Texas court system, the Supreme Court granted certiorari "because of the manifest importance of the constitutional issues involved."[64]

Faced with a state which now provided in-state education in the law for blacks, the Court examined the extent to which the Equal Protection Clause of the Fourteenth Amendment limited the power of a state to separate students of different races in professional and graduate education in a state university.[65] The State of Texas argued that under *Plessy* the law did not prohibit a state from providing education for its white and black students at separate schools when equal education was furnished to both groups.[66] This position was supported by a brief of eleven southern attorneys general, which acknowledged that although the mandate of *Plessy* had not historically been honored as it should, that failure did not require rejecting well-settled law.[67]

The Legal Defense Fund of the NAACP took a far more aggressive position in its *Sweatt* brief than it had taken in *Sipuel*, urging the Court to reverse its earlier holdings on *Plessy* and declare that segregation had no place in education. While more militant than in the past, the Legal Defense Fund still hedged by refusing to launch a full assault on the practice of segregation itself.[68]

In a brilliant move, Marshall asked Yale law professor Thomas I. Emerson to write an *amicus* brief on behalf of a committee of leading law professors and to present a direct, full-scale attack on segregation itself. Emerson agreed and, with the assistance of two colleagues, prepared the brief which

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[63] *Id.*

[64] *Id.*

[65] *Id.* at 631.

[66] KLUGER, *supra* note 39, at 276.

[67] *Id.*

[68] *Id.* at 274. Thurgood Marshall's assessment of the Supreme Court at the time convinced him that a frontal attack on segregation, not as practiced, but as conceived, might backfire. Consequently, he chose to cling to the position that segregation was illegal because, as practiced, it did not provide equality for blacks. He continued to emphasize the consequences of segregation rather than its constitutional standing. *Id.* at 274-75.

was signed by 187 law professors from prestigious schools across the country.[69]

The Committee of Law Teachers Against Segregation in Legal Education squarely attacked segregation and challenged the constitutionality of denying admission on the basis of race.[70] As did the NAACP, the Committee also provided an alternative argument for educational equality lest the Court rule against plaintiffs and reaffirm *Plessy*.[71] The Committee distinguished those tangible inequalities from which a state could buy its way free from those which no amount of money could acquire. The first group of tangibles included the size of the library and faculty, the educational and professional background of the faculty, and the number of course offerings.[72] The second group included more intangible factors, such as the inability of a small student body to discuss issues from divergent points of view;[73] the inability of a small, newly created law school to support extracurricular aids to legal education, such as moot court, law review, and legal aid programs; and the lack of alumni providing students contact with the practicing bar.[74]

Relying heavily on the Law Teachers' brief, the Court undertook an assessment of the less tangible, but important, indicia of comparability of the University of Texas Law School and that of Texas State University:

> [W]e cannot find substantial equality in the educational opportunities offered white and Negro law students by the

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[69] *Id.* at 275. The full brief of the Committee is reprinted at Thomas I. Emerson et al., *Segregation and The Equal Protection Clause*, 34 MINN. L. REV. 289 (1950).

[70] KLUGER, *supra* note 39, at 275.

[71] Emerson, et al., *supra* note 69, at 320-27.

[72] *Id.* at 323-24.

[73] *Id.* at 323.

[74] *Id.* at 324-25. John P. Frank, a law professor at Yale and one of the authors of the brief, later explained that its primary thrust was to ask for the abolition of the whole separate-but-equal doctrine. But, he argued, it would have been an error to concede the issue of educational equality and foreclose the possibility of winning on that basis. PREER, *supra* note 33, at 104 (quoting *Court Action as a Means of Achieving Racial Integration in Education*, 21 J. NEGRO EDUC. 334 (Summer 1952)).

> State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.[75]

Although declining to re-examine *Plessy*, the Court ordered the University of Texas Law School to admit Sweatt.[76] This was the first time the Court compelled the admission of a black student to a school previously maintained only for white students on the ground that the separate schools were unequal.[77]

D. McLaurin v. Oklahoma State Regents

Finally, *McLaurin v. Oklahoma State Regents*,[78] the last of the pre-*Brown I* higher education cases, expanded the interpretation of substantial equality and equal treatment.[79] As did its predecessors, however, *McLaurin* also failed "to disturb *Plessy's* deep moorings."[80]

In *McLaurin*, the plaintiff, a sixty-eight-year-old retired black professor already holding a master's degree, applied for admission to the University of Oklahoma to pursue studies leading to a doctorate in education. His application was denied solely because of his race.[81]

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[75] *Sweatt*, 339 U.S. at 633-34.

[76] *Id.* at 636.

[77] KLUGER, *supra* note 39, at 282.

[78] 339 U.S. 637 (1950).

[79] Miller, *supra* note 49, at 568.

[80] KLUGER, *supra* note 39, at 283.

[81] *McLaurin*, 339 U.S. at 638. School authorities were required to exclude him by Oklahoma law, which made it a misdemeanor to maintain, operate, teach or attend a school at which both whites and blacks are enrolled or taught. *Id.* at

McLaurin sought injunctive relief.[82] Following *Gaines* and *Sipuel*, a statutory three-judge district court held that the state had a constitutional duty to provide him with the education he sought as soon as it provided that education to any other group.[83] The Court further held that to the extent the Oklahoma statutes denied him admission, they were unconstitutional and void.[84] Assuming that the state would follow the constitutional mandate, the Court refused to grant the injunction, but retained jurisdiction to issue any future orders necessary to secure McLaurin equal protection of the laws.[85]

Following this decision, the Oklahoma legislature amended its existing statutes to permit the admission of blacks to institutions of higher learning attended by white students where those institutions offered courses not available at black schools. The amendments provided, however, that in such cases the programs of instruction should be given on a segregated basis.[86]

Within these constraints, McLaurin was admitted to the graduate school. He was required to sit apart at a designated desk in an anteroom adjoining the classroom;[87] to sit at a designated desk on the mezzanine of the library; and to sit at a special table and eat at a designated time in the school cafeteria different from that of other students.[88]

McLaurin sought to have these conditions removed, but was denied relief by the district court and appealed to the Supreme Court.[89] The Court found that these actions handicapped McLaurin's educational pursuits because they impaired

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638.

[82] *Id.*

[83] *Id.* at 639.

[84] *Id.*

[85] *Id.*

[86] *McLaurin*, 339 U.S. at 639. "Segregated basis" was defined as "classroom instruction given in separate classrooms, or at separate times." *Id.* at n.1.

[87] *Id.* at 640. When McLaurin was later permitted to sit at a desk inside the classroom, the row of seats where he was placed was surrounded by a rail on which there was a sign stating, "Reserved For Colored." *Id.*

[88] *Id.*

[89] *Id.*

"his ability to study, to engage in discussions and exchange views with other students, and in general, to learn his profession."[90]

Holding that these state-imposed restrictions deprived McLaurin of equal protection, the Court said: "We hold that under these circumstances the Fourteenth Amendment precludes differences in treatment by the state based upon race. Appellant, having been admitted to a state-supported graduate school, must receive the same treatment at the hands of the state as students of other races."[91]

In both *Sweatt* and *McLaurin*, the Court based its decisions upon the inherent inequality of intangible educational opportunities provided black students as compared to those provided for whites, such as the opportunity to engage in discussions, interact with other students, and experience a broad range of learning activities. By focusing on the unequal aspects of educational opportunity, the Court seemed to commit itself to the position that equality could not be achieved in separate graduate and professional schools. Recognition of the relevance of intangible factors opened the way to the Court's holding in *Brown I* that "separate is inherently unequal."[92]

Following the *Sweatt* and *McLaurin* decisions, state and federal courts ordered the admission of blacks to graduate and professional programs at the major state universities in Virginia,[93] Missouri,[94] Louisiana,[95] North Carolina,[96] and Tennes-

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[90] *Id.* at 641.

[91] *McLaurin*, 339 U.S. at 642.

[92] TUSHNET, *supra* note 53, at 132. In the framework of the times, this negative view of the educational opportunity available in institutions maintained for black students was accepted as a necessary part of the attack on segregation. In time, however, many black educators reacted angrily to the notion of educational inferiority that underlay the early higher education cases, as well as *Brown I*. *See generally* PREER, *supra* note 33, at 195.

[93] U.S. COMM'N ON CIVIL RIGHTS, EQUAL PROTECTION OF THE LAWS IN PUBLIC HIGHER EDUCATION 34 (1960) [hereinafter EQUAL PROTECTION].

[94] State *ex rel.* Toliver v. Board of Educ., 230 S.W.2d 724 (Mo. 1950).

[95] Wilson v. Board of Supervisors, 92 F. Supp. 986 (E.D. La. 1950), *aff'd*, 340 U.S. 909 (1951).

[96] McKissick v. Carmichael, 187 F.2d 949 (4th Cir. 1951), *cert. denied*, 341 U.S. 951 (1951).

see.[97] On the eve of the *Brown I* decision, blacks had gained admission to white graduate and professional institutions in twelve of the seventeen southern and border states, although, in most instances, only for courses not offered at the states' public black colleges. The other five southern states—Alabama, Florida, Georgia, Mississippi, and South Carolina—still maintained complete segregation.[98]

The NAACP's strategy to direct its first attack upon segregation at the graduate/professional school level arose from several considerations. First, there were separate public undergraduate colleges for blacks in each of the seventeen southern and border states, but no public[99] black graduate or professional schools.[100] The Court would, therefore, have to see that there was an area where "educational facilities for blacks were neither separate nor equal but non-existent."[101] Second, the cost of providing separate education for black and white students at the graduate/professional school level was predicted to become so expensive that states would no longer consider separation of the races at this level economically viable.[102] Third, resistance by segregationists was not likely to be nearly as intense at the graduate school level because of the relatively small number of blacks who would be involved and their maturity.[103]

Even though the thrust of the desegregation effort was not

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[97] Gray v. University of Tenn., 342 U.S. 517 (1952).

[98] U.S. COMM'N ON CIVIL RIGHTS, THE BLACK/WHITE COLLEGES: DISMANTLING THE DUAL SYSTEM OF HIGHER EDUCATION (C. Williams, ed., 1981) [hereinafter BLACK/WHITE COLLEGES].

[99] KLUGER, *supra* note 39, at 136. At the time, Howard University and Meharry Medical College in Nashville were the only two black graduate or professional schools in southern or border states and both were private institutions. *Id.*

[100] Charles H. Wesley, *Graduate Education for Negroes in Southern Universities*, 10 HARV. EDUC. REV. 82, 94 (1940).

[101] KLUGER, *supra* note 39, at 137.

[102] TUSHNET, *supra* note 53, at 103. Professor Tushnet recounts a journalist in 1946 observing that it had cost the state of Missouri "$500,000 to graduate one student from the black law school and ten students from the black journalism school in Lincoln University." *Id.* (quoting THE HIGH COST OF SEGREGATED GRADUATE SCHOOLS FOR NEGROES, SCHOOL AND SOCIETY 63 (May 8, 1946)).

[103] *Id.* at 103.

aimed at the undergraduate level, several white colleges and junior colleges between 1946 and 1954 voluntarily admitted black students, and in other instances, blacks gained admission at the undergraduate level through the courts.[104]

By 1950, the meaning of separate-but-equal in higher education had evolved to require a state to provide within its borders, simultaneously for black and white students, the same courses of study; educational facilities of the same size, quality, and variety; colleges of the same prestige; faculties of the same reputation; and an opportunity within the academic institution to commingle with other students free of state-imposed restrictions.[105] For all practical purposes, separate-but-equal schools in higher education were operationally impossible. On the eve of *Brown*, either segregation would have to be abandoned or the states would be faced with the staggering cost of bringing black graduate, professional, and even undergraduate schools up to the level of white schools.[106]

The higher education cases, from *Gaines* in 1938 to *Sweatt* in 1950, were immensely important in enforcing the "equality" side of the separate-but-equal doctrine. None, however, involved a major break with the standard. At the end of this twelve year period, separate-but-equal emerged badly strained, but essentially intact.[107]

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[104] *See* Constantine v. Southwestern Louisiana Inst., 120 F. Supp. 414, 417 (W.D. La. 1954) (precluding college officials from denying admission to blacks based on existence of separate black school); Battle v. Wichita Falls Junior College Dist., 101 F. Supp. 82, 87 (N.D. Tex. 1951) (compelling admission of blacks to junior college district), *aff'd*, 204 F.2d 632 (5th Cir. 1953), *cert. denied*, 347 U.S. 975 (1954); Wilson v. City of Paducah, 100 F. Supp. 116, 118 (W.D. Ky. 1951) (enjoining city from denying blacks admission to junior college); Parker v. University of Delaware, 75 A.2d 225, 234 (Del. 1950) (granting injunction to preclude trustees from withholding application forms from black applicants).

[105] STEPHEN L. WASBY ET AL., DESEGREGATION FROM BROWN TO ALEXANDER 57 (1977).

[106] WIGGINS, *Desegregation in Higher Education—1975 Dateline*, in EQUALITY OF OPPORTUNITY IN HIGHER EDUCATION: MYTH OR REALITY 16 (P. Mohr ed. 1976).

[107] Irving G. Hendrick, *Stare Decisis, Federalism, and Judicial Self-Restraint: Concepts Perpetuating the Separate But Equal Doctrine in Public Education, 1849-1954*, 12 J. LAW & EDUC. 561, 579 (1983).

III. From Separate-But-Equal to Affirmative Obligation

A. Brown v. Board of Education

Riding on the momentum of the higher education victories and several successful direct assaults on the separate-but-equal doctrine in areas outside of education,[108] the NAACP was ready in 1950 to launch a direct attack on the constitutionality of segregation itself and to focus this attack on the elementary-secondary level. The NAACP Legal Defense and Educational Fund initiated five separate class action challenges to segregation in public elementary and secondary schools in Kansas, Virginia, Delaware, South Carolina, and the District of Columbia.[109] As expected, the suits met with substantial failure in the lower courts.[110]

In 1952 the Supreme Court granted review in all five cases and heard the first round of arguments in December of that year. As expected, social science testimony constituted a significant part of the plaintiffs' briefs and records brought up on appeal. Thirty social scientists with substantial reputations asserted that segregation did vast psychological damage both to black and white children.[111]

After a six month silence, the Court in June of 1953 set the cases for reargument and asked counsel to prepare answers to five questions concerning original intent underlying the framing, adoption, and ratification of the Fourteenth Amendment as it bore on school segregation; whether it was within the judicial power to abolish segregation; and advice on how any desegrega-

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[108] *See, e.g.*, Henderson v. United States, 339 U.S. 816, 824 (1950) (compulsory segregation on interstate trains held unconstitutional); Morgan v. Virginia, 328 U.S. 373, 386 (1946) (Virginia segregation statute applied to interstate buses declared unconstitutional).

[109] *See,* Bolling v. Sharpe, 347 U.S. 497 (1954); Davis v. County Sch. Bd., 103 F. Supp. 337 (E.D. Va. 1952), *prob. juris noted*, 344 U.S. 1 (1952); Belton v. Gebhart, 87 A.2d 862 (Del. Ch. 1952), *aff'd*, 91 A.2d 137 (Del. 1954); Brown v. Board of Educ., 98 F. Supp. 797 (D. Kan. 1951), *rev'd*, 349 U.S. 249 (1955); Briggs v. Elliott, 98 F. Supp. 529 (E.D. S.C. 1951), *vacated*, 342 U.S. 350 (1952).

[110] Loren Miller, The Petitioners: The Story of the Supreme Court of the United States and the Negro 342-46 (1966).

[111] *Brown I*, 397 U.S. at 494 n.11.

tion order might be carried out in the event the Court should decide to declare separation of the races on the basis of color in public education to be unconstitutional.[112]

Prior to reargument, the death of Chief Justice Vinson led to the appointment of Governor Earl Warren of California, who from the beginning saw *Brown I* as a "comparatively simple case."[113] He thought that the higher education cases from *Gaines* to *Sweatt* effectively crippled the separate-but-equal doctrines, that separate-but-equal systems rarely resulted in comparable educational facilities for whites and blacks, and that the enforced separation of human beings based on race was an apparent injustice.[114]

Unlike Vinson, who worried about the reluctance of Congress to change segregated practices, the entrenched customs of segregation in the South, and the longstanding existence of the *Plessy* principle, Warren was concerned primarily with how to effectively implement a decision to eradicate segregation in the public schools.[115] The importance of such a decision called for a united Court, a task which the new Chief Justice set about successfully to achieve.[116]

On May 17, 1954, the Court handed down its historic decision holding that racially segregated public schools deprived black children of the equal protection of the laws guaranteed by the Fourteenth Amendment.[117] The Court said:

> Does segregation of children in public schools solely on the basis of race even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.[118]

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[112] KLUGER, *supra* note 39, at 615.

[113] G. EDWARD WHITE, EARL WARREN, A PUBLIC LIFE 163 (1982).

[114] *Id.*

[115] *Id.*

[116] *Id.* For detailed coverage of the leadership of Chief Justice Warren in bringing unanimity to the Court in the *Brown I* decision, see KLUGER, *supra* note 39, at 657-778.

[117] *Brown I*, 347 U.S. at 495.

[118] *Id.* at 493.

In a unanimous opinion written by the Chief Justice, the Court concluded that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[119]

On the constitutional question, the Court was unequivocal. There were, however, no immediate decrees ordering an end to school segregation in the affected areas.[120] The cases were restored to the docket for further argument on how the decision should be implemented.[121]

Brown was reargued in April of 1955, and the Supreme Court rendered its implementation decision, *Brown v. Board of Education (Brown II)*,[122] on May 31, 1955. The Court remanded the cases to the district courts with guidelines to place responsibility for desegregation on local school officials, to require prompt initiation of desegregation programs, to be reasonable but firm in allowing extensions of time, and to ignore local segregationist feelings as excuses for delay.[123] District judges were ordered to retain jurisdiction to assure progress "with all deliberate speed."[124]

The six border states of Delaware, Maryland, West Virginia, Kentucky, Missouri and Oklahoma, voluntarily or by court order, had taken some steps toward desegregation prior to 1954. Following *Brown*, they, along with the District of Columbia, took legislative and administrative action to abolish *de jure* segregation in public higher education.[125]

The states of Arkansas, Virginia, and North Carolina made "limited and circumscribed" efforts to desegregate their public universities. The University of Arkansas, for example, admitted blacks only for courses not offered at the black public college. The University of Virginia had a similar policy.[126]

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[119] *Id.* at 495.

[120] DANIEL BERMAN, IT IS SO ORDERED 113 (1966).

[121] *Brown I*, 347 U.S. at 495-96.

[122] 349 U.S. 294 (1955), *rev'g*, 98 F. Supp. 797 (D. Kan. 1951).

[123] *Brown II*, 349 U.S. at 299-300.

[124] *Id.* at 301.

[125] EQUAL PROTECTION, *supra* note 93, at 51-56.

[126] *Id.* at 57.

Both Tennessee and Texas, as a result of Court orders, had desegregated their graduate and professional schools prior to *Brown*.[127] Blacks were admitted to undergraduate programs at public universities in those states only after protracted litigation.[128]

Massive resistance to desegregation occurred in Alabama, Georgia, Florida, Louisiana, Mississippi, and South Carolina. These states used a potpourri of administrative, legislative, educational, and legal techniques to deny blacks admission to white colleges and universities.[129]

Events surrounding the desegregation of the Universities of Alabama, Georgia, and Mississippi epitomized the politics of massive resistance.[130] In February 1956, Autherine Lucy entered the University of Alabama under court order.[131] She at-

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[127] *See* Gray v. University of Tenn., 342 U.S. 517 (1952); Sweatt v. Painter, 339 U.S. 629 (1950).

[128] *See* Booker v. Tennessee Bd. of Educ., 240 F.2d 689 (6th Cir. 1957) (after five years of litigation, black students admitted to Memphis State University), *cert. denied*, 353 U.S. 965 (1955); Whitmore v. Stilwell, 227 F.2d 187 (5th Cir. 1955) (after long years of litigation, court declared plaintiffs had constitutional right to admission to Texarkana Junior College on same basis as white students); Wichita Falls Junior College Dist. v. Battle, 204 F.2d 632 (5th Cir. 1953) (constitutional rights of plaintiffs were violated by requiring them to travel great distances to take courses offered at junior college in their hometown), *cert. denied*, 347 U.S. 974 (1954).

[129] For example, admission tests were introduced; recommendations from alumni or circuit court judges were required; new maximum age restrictions of 21 for undergraduates and 25 for graduate students were set; subjective character assessments were made of applicants; graduation from an accredited institution was made a prerequisite for admission (most black colleges in these states were not accredited at the time); statutes were passed closing any public colleges or universities ordered by a court to desegregate; public appropriations were to be denied to institutions that did not remain segregated; and advocacy of racial integration by a school employee was grounds for dismissal. EQUAL PROTECTION, *supra* note 93, at 69-96.

[130] BLACK/WHITE COLLEGES, *supra* note 98, at 8.

[131] Lucy v. Adams, 134 F. Supp. 235, 1237 (N.D. Ala. 1955), *aff'd*, 228 F.2d 619 (5th Cir. 1956), *cert. denied*, 351 U.S. 931 (1956). Suit had been filed four years earlier seeking admission for Lucy and Polly Ann Myers. *Id.* at 238. President Carmichael tried to persuade the University Board of Trustees to admit the two women quietly, but Carmichael's efforts were to no avail. Knight v. Alabama, 787 F. Supp. 1030, 1106 (N.D. Ala. 1991). The Board adopted a policy to stop or delay desegregation by all legal means and even went so far as to hire a detective firm to investigate the private backgrounds of both applicants. The agency

tended classes for less than a week before rioting by white students and their non-student supporters drove her from the campus.[132] When one of her lawyers, Constance Baker Motley, suggested during a press conference that the University had conspired with the mob, the institution's Trustees voted to expel Lucy permanently on the ground that she had libeled the University.[133]

Five years after Lucy's brief matriculation at the University of Alabama, Hamilton Holmes and Charlayne Hunter were enrolled in the University of Georgia by order of a federal court. Riots ensued and the two were suspended. The court immediately ordered them reinstated.[134]

In 1962, the Fifth Circuit ordered the University of Mississippi to admit James Meredith to its undergraduate program.[135] Although the University was willing to comply, the Board of Trustees of State Institutions of Higher Learning authorized Governor Ross Barnett to handle the situation. In defiance of the Fifth Circuit's order, Governor Barnett first

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uncovered information that Myers had conceived a child out of wedlock and that her husband had a criminal record. The Board ordered the University administration to exclude Myers on the grounds of her lack of the kind of moral character expected of a University of Alabama coed. *Id.* at 1107.

[132] *Knight*, 787 F. Supp. at 1106. Following two days of unrest and one day of rioting, the Board of Trustees suspended Lucy on February 6, 1956, allegedly for her own safety and that of other students and faculty. *Id.* at 1107.

[133] Southern Education Foundation, ENDING DISCRIMINATION IN HIGHER EDUCATION 2 (1974)[hereinafter ENDING DISCRIMINATION IN HIGHER EDUCATION]. Thirty-six years later, on May 9, 1992, Autherine Lucy Foster received her Master's degree in elementary education and her daughter, Grazia Foster, received an undergraduate degree in corporate finance from the University of Alabama during the Spring commencement exercise. *Student Rises from '56 Riot*, THE CLARION-LEDGER (Jackson, Miss.), May 9, 1992, at A2.

[134] *Id.* at 2. Holmes subsequently achieved Phi Beta Kappa, and Hunter became a news broadcaster for the Public Broadcasting System. REED SARRATT, THE ORDEAL OF DESEGREGATION 134 (1966).

[135] Meredith v. Fair, 305 F.2d 343, 344 (5th Cir.) (holding that discrimination against Meredith was unconstitutional), *cert. denied*, 371 U.S. 828 (1962); *see* DAVID A. SANSING, MAKING HASTE SLOWLY: THE TROUBLED HISTORY OF HIGHER EDUCATION IN MISSISSIPPI (1991) (thorough, readable account of history of higher education in Mississippi). Professor Sansing describes the Meredith crisis as "one of the crucial events in the American civil rights revolution, as well as a turning point in Mississippi history." *Id.* at 156.

invoked Mississippi's Resolution of Interposition,[136] which declared *Brown II* null and void within the State of Mississippi, then he personally blocked Meredith's registration on September 25, 1962. Lieutenant-Governor Paul Johnson, Jr., repeated this action the following day.[137] In response, President Kennedy ordered United States Marshals to assist in enforcing the court's order by escorting Meredith to the campus and through the registration process.[138] A riot ensued in which two were killed and over 300 injured. President Kennedy federalized the state's National Guard to stop the violence, and federal marshals escorted Meredith during his time on campus to guarantee his safety until he graduated in the summer of 1963.[139]

Although admitted without riots and violence, Cleve McDowell was forced to obtain a federal court order to gain admission to the University of Mississippi School of Law in the summer of 1963,[140] and Cleveland Donald had to have an order of the court to enter the summer school program at the University in 1964.[141] Though spared the national spotlight and glare of international attention which was focused on the University of Mississippi, Mississippi's other historically white institutions did not admit their first black students nor did historically black institutions admit their first white students until three and four years, respectively, after James Meredith's

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[136] 1956 Miss. Laws 741. The Mississippi Interposition Law was one of the many acts passed by the Mississippi Legislature in the years after *Brown* designed to negate the effect of the Supreme Court's decision; *see, e.g.*, Miss. Const. art. VIII, 213-B (1954) (state constitution amended to permit Legislature to abolish all public schools in state); Act of Feb. 24, 1956, 1956 Laws 366 (repealing compulsory education laws); Act of April 5, 1956, 1956 Miss. Laws 303 (giving effect to Resolution of Interposition and principle of racial segregation); Act of April 5, 1956, 1956 Laws 337 (maintaining racially separate school districts); Act of April 4, 1955, 1955 Ex. Sess. 133 (prohibiting blacks from attending the same state funded high schools as whites).

[137] United States v. Barnett, 330 F.2d 369, 377 (5th Cir. 1963) (en banc), *certifying questions to* 376 U.S. 681, *reh'g, denied*, 377 U.S. 973 (1964). Both the governor and the lieutenant-governor were held in contempt of court. *Id.*

[138] United States v. Barnett, 376 U.S. 681, 686 (1964); *see* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 174-75 (3d rev. ed. 1974).

[139] ENDING DISCRIMINATION IN HIGHER EDUCATION, *supra* note 133, at 2.

[140] McDowell v. Tubb, No. 3425 (S.D. Miss. June 4, 1963).

[141] Donald v. Tubb, No. 3583 (S.D. Miss., June 10, 1964).

dramatic entrance into the University of Mississippi.[142]

In January of 1963, Harvey Gantt was admitted to Clemson College in South Carolina without an eruption of violent white resistance; however, six months later President Kennedy again had to federalize a state's National Guard to force Governor George Wallace to step aside and allow James Hood and Vivian Malone to enroll at the University of Alabama.[143]

During the first decade after *Brown II*, the color line in higher education was clearly broken as approximately three-fourths of the formerly white public higher education institutions in the southern and border states enrolled a small number of blacks.[144] However, by 1964, sixty-four percent of public colleges and universities in the Deep South states were still totally segregated.[145] The majority of black students in those states continued to attend traditionally black institutions, and those institutions continued to occupy the second class status afforded them under segregation.[146]

B. The Civil Rights Act of 1964 and the Adams Litigation

Because little progress was achieved in providing blacks with equal educational opportunities,[147] civil rights advocates

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[142] Ayers v. Allain, 893 F.2d at 734. Mississippi's historically white institutions admitted their first black students in the following years: University of Mississippi (1962), Mississippi State University (1965), Mississippi University for Women (1966), Delta State University (1966), University of Southern Mississippi (1967). Mississippi's historically black institutions admitted their first white students in the following years: Alcorn State University (1966), Jackson State University (1969), Mississippi Valley State University (1970). *Id.*

[143] ENDING DISCRIMINATION IN HIGHER EDUCATION, *supra* note 133, at 2. Gantt subsequently became mayor of Charlotte, North Carolina, and nearly defeated Senator Jesse Helms in a race for the United States Senate from North Carolina, *Id.*

[144] BLACK/WHITE COLLEGES, *supra* note 98, at 8.

[145] *Id.*

[146] EQUAL PROTECTION, *supra* note 93, at 97-142. The U.S. Commission on Civil Rights in this report presented a comparison of the education offered at the white colleges with that of the black public colleges, revealing the magnitude of the black students' continuing deprivation of educational opportunity under segregation.

[147] STAFF OF U.S. COMM'N ON CIVIL RIGHTS, PUBLIC EDUCATION 44 (1963). In the 1963-64 school year, the percent of black students enrolled in desegregated

began to stress the need for stronger federal action to end discrimination. In response, Congress passed the most comprehensive civil rights act since Reconstruction—the Civil Rights Act of 1964.[148] Title VI of the Act states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[149]

The Department of Health, Education, and Welfare (HEW) was given responsibility for enforcing Title VI in educational institutions receiving federal funds.[150] Between 1964 and 1969, HEW's efforts to implement Title VI were directed at desegregating elementary and secondary schools. Not until 1969 did HEW begin an examination of ten states that continued to operate dual systems of public higher education — Arkansas, Florida, Georgia, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, Pennsylvania, and Virginia—to determine whether their educational systems were desegregated.[151]

HEW found that these states were continuing to operate segregated dual higher education systems in violation of Title VI,[152] notified them of that conclusion, and directed them to

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schools in the Deep South was as follows: Alabama 0.004; Arkansas 0.968; Florida 1.53; Georgia 0.052; Louisiana 0.602; Mississippi 0; North Carolina 0.538; South Carolina 0.004; Tennessee 2.71; Texas 4.29; and Virginia 1.57. *Id.* at 163.

[148] 42 U.S.C. §§ 2000c, 2000d-2004-4 (1988).

[149] 42 U.S.C. § 2000d (1988).

[150] John B. Williams, III, *Title VI Regulation of Higher Education, in* DESEGREGATING AMERICA'S COLLEGES AND UNIVERSITIES 3, 5 (John Williams ed., 1988).

[151] Title VI compliance procedures required that the enforcing agency first seek voluntary compliance from recipients of federal funds that had not eliminated the vestiges of the dual system. Failure to comply voluntarily could lead to the termination of such funds. As an alternative, the enforcing agency could refer the noncomplying institutions to the Justice Department for judicial remedies. BLACK/WHITE COLLEGES, *supra* note 98, at 8 (quoting 45 C.F.R. § 80.8 (a)(b)(c)(1979)).

[152] Williams, *supra* note 150, at 5. The Department based its findings not on specific instances of discrimination but on broad patterns of racial identifiability in enrollment. At that time, there were no guidelines for desegregation at the

submit statewide plans for desegregation within 120 days. Five of the states ignored the directive and the other five submitted plans unacceptable to HEW, yet the Department did nothing. It filed no formal complaints, instituted no enforcement proceedings, and referred none of the cases to the Department of Justice for prosecution.[153] HEW's failure to fulfill its Title VI responsibilities led to the massive *Adams* litigation,[154] a class-action suit brought by the NAACP Legal Defense Fund against HEW in the district court for the District of Columbia, charging that the Department had defaulted on its obligation to enforce Title VI by continuing to provide financial assistance to colleges and universities which practiced segregation and discrimination. Plaintiffs asked the court to compel HEW to enforce the law, either by obtaining acceptable desegregation plans from the states or by cutting off federal funds to those colleges and universities which failed to produce acceptable plans of desegregation.[155]

Judge John H. Pratt found that HEW had failed to fulfill its responsibilities under Title VI and issued an injunction ordering the Department to institute compliance procedures against the ten states operating dual systems of higher education within 120 days of the order.[156] The Court of Appeals for the District of Columbia Circuit upheld Judge Pratt's decision.[157] Although noting that desegregation problems in colleg-

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higher education level, and no definition of how much racial balance was required. A considerable amount of confusion and ambivalence existed concerning the meaning of desegregation for colleges and universities. Conflicts within HEW, the NAACP, and black higher education organizations were developing over the legal compatibility of the retention of black colleges as such while achieving a unitary, non-racially identifiable system of higher education.

[153] Adams v. Richardson, 480 F.2d 1159, 1164 (D.C. Cir. 1973) (en banc).

[154] *See infra* note 166. The case is referred to as the "Adams" litigation after Kenneth Adams, a Mississippi high school student whose name appeared first in alphabetical order on the original complaint. Scott Jaschik, *Appeals Court Dismisses Landmark 1970 Lawsuit on College Desegregation*, THE CHRONICLE OF HIGHER EDUC., July 5, 1990, at A22.

[155] *See* Charles V. Willie, *Title VI Regulation of Higher Education*, *in* DESEGREGATING AMERICA'S COLLEGES AND UNIVERSITIES 103, 104 (John Williams ed., 1988).

[156] Adams v. Richardson, 356 F. Supp. 92, 94-95 (D.D.C. 1973).

[157] *Adams*, 480 F.2d at 1164.

es and universities differ widely from those in elementary and secondary schools, the court found that the differences did not justify a failure on the part of HEW to comply with a congressional mandate.[158]

By June of 1974, HEW had received plans from all of the states except Louisiana, which refused to submit one.[159] HEW found the Mississippi plan unacceptable because it dealt only with its four-year colleges and universities and did not include its system of junior colleges.[160] Both states were referred to the Department of Justice for commencement of enforcement proceedings.[161]

In 1977, the *Adams* plaintiffs returned to court challenging HEW's acceptance of the other eight desegregation plans.[162] The plaintiffs charged that the plans failed to meet the requirements HEW had earlier specified. Agreeing, and further finding that the plans submitted had failed to achieve significant desegregation, the court ordered HEW to devise criteria specifying the elements of an acceptable statewide plan for the desegregation of higher education.[163]

In response to this order, HEW developed and issued the *Amended Criteria Specifying Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education*,[164] which were made applicable to all states that once operated systems of higher education segregated by law. The *Amended Criteria* set forth four major requirements for state higher edu-

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[158] *Id.*

[159] *See generally*, Darrell K. Hickman, Note, *Realizing the Dream: United States v. State of Louisiana*, 50 LA. L. REV. 583, 586 (1990).

[160] *Ayers*, 674 F. Supp. at 1530. Although HEW refused to accept the Mississippi Plan of Compliance, the Board of Trustees of State Institutions of Higher Learning adopted it anyway. *Id.* "[E]ven the limited effects of this Plan in disestablishing the prior segregated system [of higher education] were substantially constricted by the state legislature, which refused to fund it until Fiscal Year 1978, and then at well under half the amount requested by the Board." *Fordice*, 112 S. Ct. at 2733.

[161] Scott Jaschik, *The Adams Case, 1970 to Present*, THE CHRONICLE OF HIGHER EDUC., July 5, 1990, at A22.

[162] Adams v. Califano, 430 F. Supp. 118, 121 (D.D.C. 1977).

[163] *Id.* at 121.

[164] 42 Fed. Reg. 40780-85 (1977).

cation desegregation plans: (1) disestablishment of the structure of dual systems; (2) desegregation of student enrollment at both black and white institutions; (3) desegregation of faculty, administrative staffs, non-academic personnel, and governing boards; and (4) reporting and monitoring requirements.[165]

In 1979, the Department of Education was created and assumed responsibility for the *Adams* litigation. In June of 1990, after nearly twenty years of litigation, *Adams* was dismissed for lack of standing.[166] In spite of the fact that it ended "not with a bang but a whimper," the impact of *Adams* on the desegregation of higher education institutions has been enor-

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[165] Williams, *supra* note 150, at 9; *see* Brief *Amici Curiae* of Joseph A. Califano, Jr., Mary F. Berry, Ernest L. Boyer and David S. Tatel at 5-14, United States v. Fordice, 112 S. Ct. 2727 (1992) (Nos. 90-6588 and 90-1205). The authors were officials of HEW who developed the *Amended Criteria*. In the Amici Brief, they set forth three underlying principles upon which the *Amended Criteria* were based: higher education desegregation process is governed by principles set forth in *Green* and *Swann*, but account must be taken of fundamental differences between higher education and elementary/secondary school systems in developing appropriate remedy; establishment of overall goals to measure effectiveness of desegregation efforts, but states retain freedom to develop own measures for accomplishing those goals; and, higher education process must be implemented so as to avoid placing disproportionate burden on black students, faculty, and institutions. *Id.* at 7.

[166] *See* Adams v. Richardson, 356 F. Supp. 92 (D.D.C. 1973) (ordering HEW enjoined to commence enforcement proceedings against ten states operating dual systems of higher education), *modified and aff'd*, 480 F.2d 1159, 1164 (D.C. Cir. 1973) ("We agree with the District Court's conclusion that HEW may not neglect this area of its responsibility. However, we are also mindful that desegregation problems in colleges and universities differ widely from those in elementary and secondary schools . . . ."), *supplemental order sub nom.*, Adams v. Weinberger, 391 F. Supp. 269 (D.D.C. 1975) (again ordering HEW to enforce Title VI requirements), *second supplemental order sub nom.*, Adams v. Califano, 430 F. Supp. 118 (D.D.C. 1977) (admonishing HEW for approving plans that did not meet Title VI requirements and ordering HEW to develop specific criteria and draft new guidelines for desegregation plans); Adams v. Bell, 711 F.2d 161 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1021 (1984); Women's Equity Action League v. Bell, 743 F.2d 42 (D.C. Cir. 1984), *remanded sub nom.*, Adams v. Bennett, 675 F. Supp. 668 (D.D.C. 1987) (dismissing suit for lack of standing caused by change in law which granted private right of action to plaintiffs against institutions in Title VI action), *rev'd sub nom.*, Women's Equity Action League v. Cavazos, 879 F.2d 880 (D.C. Cir. 1989), *aff'd on reh'g*, 906 F.2d 742 (D.C. Cir. 1990) (relying on Cannon v. University of Chicago, 441 U.S. 677 (1979), where private right of action was recognized for individuals injured by violation of Title VI).

mous.[167] From the *Adams* litigation came desegregation plans for seventeen states; the involvement of the Department of Justice in desegregation cases against Louisiana,[168] Mississippi,[169] and Alabama;[170] and the HEW *Amended Criteria*, which were and are still used as the goal for framing desegregation plans and measuring a state's compliance with the requirements of Title VI.[171]

C. *The Post-Brown Higher Education Cases*

The basic constitutional principles of *Brown I* were immediately extended to colleges and universities.[172] The Court had

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[167] ROBERT A. DENTLER ET AL., UNIVERSITY ON TRIAL: THE CASE OF THE UNIVERSITY OF NORTH CAROLINA 3 (1983) "*Adams* became a landmark case in both education and civil rights law: it spanned ten states, it decided that those states maintained segregated colleges, it found the federal government liable for failure to obey the Civil Rights Act, and it required a speedy remedy." *Id.*; *see also* L. HAYNES, comp. A CRITICAL EXAMINATION OF THE ADAMS CASE II-3 (1978)("The most important legal action to affect the educational hopes and aspirations of blacks and black colleges since 1954 involves decisions growing out of the *Adams* case").

[168] *See* United States v. Louisiana, 527 F. Supp. 509 (E.D. La. 1981); United States v. Louisiana, 692 F. Supp 642 (E.D. La. 1988); 718 F. Supp. 499 (E.D. La. 1989); 751 F. Supp. 606 (E.D. La. 1990); No. CIV.A 80-3300, 1993 WL 407330 (E.D. La. Dec. 23, 1992).

[169] Ayers v. Allain, 674 F. Supp. 1523 (N.D. Miss. 1987), *rev'd*, 893 F.2d 732 (5th Cir.), *reh'g en banc granted*, 898 F.2d 1014 (5th Cir.), *rev'd*, 914 F.2d 676 (5th Cir. 1990) (en banc), *vacated sub nom.*, United States v. Fordice, 112 S. Ct. 2727 (1992).

[170] United States v. Alabama, 628 F. Supp. 1137 (N.D. Ala. 1985), *rev'd*, 828 F.2d 1532 (11th Cir. 1987), *cert. denied*, 487 U.S. 1210 (1988).

[171] The *Amended Criteria* were used by both the private plaintiffs and the government in the Louisiana, Mississippi and Alabama desegregation cases as the basis for judging each state's compliance with requirements of Title VI. Extensive discourse was held at trial and in the appellate briefs over the legal force of the *Amended Criteria* and its applicability to the issues. *See generally* Brief of Petitioners (Private Plaintiffs) at 48-49; Brief of Amici Curiae NAACP Legal Defense and Educational Fund, Inc., American Civil Liberties Union, and the National Conference of Black Lawyers at 32-40; and Brief of Amici Curiae Charles E. "Buddy" Roemer, III, Governor of the State of Louisiana, Board of Regents of the State of Louisiana, and Board of Supervisors of Louisiana State University and Agricultural and Mechanical College at 24-30; United States v. Fordice, 112 S. Ct. 2727 (1992).

[172] Felix V. Baxter, *The Affirmative Duty to Desegregate Institutions of Higher Education—Defining the Role of the Traditionally Black College*, 11 J.L. & EDUC.

reserved judgment on three higher education cases pending at the time of the *Brown I* decision and proceeded on the first decision day following *Brown I* to incorporate higher education in the broad sweep of the school segregation cases. It ordered the University of Florida Law School to admit Virgil Hawkins, a black student who had been seeking admission since 1949;[173] Louisiana State University to admit black students to a combined six-year program of undergraduate and law studies;[174] and Wichita Falls Junior College to admit black residents of Wichita Falls who were having to travel 367 miles (to Prairie View) or 411 miles (to Texas Southern) for courses available to white students living at home in Wichita Falls.[175]

Following its implementation decision in *Brown II*, the Court dealt repeatedly with stalling arguments on the part of resisting states that the "all deliberate speed" standard for elementary/secondary schools should apply to higher education institutions instead of the more stringent "immediate and personal" standard usually found in fashioning remedies for constitutional deprivations. These arguments were rejected. In 1956, the Court reviewed Virgil Hawkins' third appeal and stated that since decrees involving graduate study did not present the problems of elementary and secondary schools, the slower "all deliberate speed" doctrine of *Brown II* did not extend to higher education, and Hawkins was entitled to "prompt admission under the rules and regulations applicable to other qualified candidates."[176]

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6 (1982).

[173] State ex rel. Hawkins v. Board of Control, 350 U.S. 413, 414 (1956) (per curiam).

[174] Tureaud v. Board of Supervisors, 347 U.S. 971 (1954).

[175] Wichita Falls Junior College Dist. v. Battle, 204 F.2d 632, 635 (1953), *cert. denied*, 347 U.S. 974 (1954).

[176] State ex rel. Hawkins v. Board of Control, 350 U.S. 413, 414 (1956) (per curiam). This order marked the pinnacle of Hawkins' quest for admission to the University of Florida Law School. The case dragged on for two more years and repeated trips up and down the state and federal judicial circuits. Ultimately Virgil Hawkins fell victim to changes in admission criteria that rendered him ineligible for admission. He later earned a Master's Degree in Public Relations at Boston University and a Law Degree from the New England School of Law. Although he did not take the Florida bar exam, he was admitted to the Florida bar

Memoranda decisions marked the extent of the Supreme Court's involvement in the area of higher education desegregation for many years. The mandates of *Brown II* had been made applicable to colleges and universities, but no guidelines were given for their implementation.[177] In the ensuing years, the Court focused its attention on the task of defining the scope of the constitutional and statutory[178] affirmative duty to desegregate required of elementary and secondary education systems,[179] with no indication in any of the opinions of the appli-

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by special statute of the Florida legislature. PREER, *supra* note 33, at 154 n.88.

[177] Baxter, *supra* note 172, at 7.

[178] Title VI of the Civil Rights Act of 1964 forbade discrimination on the basis of race, color or national origin in any program or activity receiving federal funds and provided for the termination of federal funds in school districts in violation of this mandate. The Office of Education of the Department of Health, Education and Welfare promulgated guidelines in response to the Act which placed an affirmative duty upon school districts to integrate. The HEW guidelines were first incorporated into a major desegregation decree in United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966). *See generally* Comment, *The Courts, HEW, and Southern School Desegregation*, 77 YALE L.J. 321 (1967) (discussing history of desegregation in the South); James R. Dunn, *Title VI, The Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42 (1967) (analyzing relationship between Title VI and southern school desegregation).

[179] *See, e.g.*, Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527 (1982) (Court upheld amendment to state constitution which had effect of preventing judicially-ordered busing in cases of de facto segregation); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982) (state's effort to nullify busing plan ruled unconstitutional); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) (*Dayton II*) (failure to fulfill affirmative duty to desegregate since 1954 constituted ongoing constitutional violation and justified system-wide remedy); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977) (*Dayton I*) (order for system-wide desegregation overturned on grounds that more specific findings of constitutional violation necessary to justify remedy); Milliken v. Bradley, 433 U.S. 267 (1977) (*Milliken II*) (compensatory educational programs along with extensive pupil reassignment plan upheld as remedy for segregated system); Milliken v. Bradley, 418 U.S. 717 (1974) (*Milliken I*) (multi-district remedy held improper where only single school district, Detroit, violated Fourteenth Amendment); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) (affirmative duty of *Green* applied to systems which had been intentionally segregated through administrative practices); Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971) (affirmed *Green* and considered the kinds of remedies, including busing and enrollment ratios, that might be employed to achieve integration); Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969) ("all deliberate speed" no longer constitutional); United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969) (affirming faculty desegregation plan); Green v. County Sch. Bd., 391 U.S. 430 (1968) (freedom of choice plan rejected because not producing results—burden placed on school board to develop

cability of these legal precedents to cases involving higher education.

D. Green v. County School Board

Of all the elementary/secondary school desegregation cases since *Brown II*, none had a greater impact[180] than *Green v. County School Board*,[181] or caused more confusion and debate among the lower courts concerning its applicability, or lack thereof, to higher education cases. The facts of *Green* were these. New Kent County, Virginia, contained two schools. New Kent School, a combined elementary/secondary school on the eastern side of the county, was predominantly white; Watkins School, a combined elementary/secondary school on the western side of the county, was totally black. There was no residential segregation in the county, and there were no attendance zones. Each school served the entire county and buses traveled overlapping routes to transport pupils to and from the two schools.[182]

The county's school board continued to maintain totally segregated schools for eleven years after *Brown I* and modified this practice only after Title VI of the Civil Rights Act of 1964 mandated the cutting off of federal funds to school districts which continued to operate racially segregated schools. The

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plan which promised prompt results); Monroe v. Board of Comm'rs, 391 U.S. 450 (1968) ("free transfer" plan rejected); Raney v. Board of Educ., 391 U.S. 443 (1968) (remanded for reconsideration in light of *Green*); Griffin v. County Sch. Bd., 377 U.S. 218 (1964) (prohibited closing of public schools to avoid desegregation); Goss v. Board of Educ., 373 U.S. 683 (1963) ("majority to minority" transfer provisions of Knoxville school system designed to avoid desegregation voided); Cooper v. Aaron, 358 U.S. 1 (1958) (tension and chaos caused by resistance to desegregation is not basis for delay in implementing desegregation plan).

[180] LINO A. GRAGLIA, DISASTER BY DECREE 67 (1976). "Although not generally realized at the time, the Supreme Court 1968 decision in *Green v. County School Board of New Kent County* and companion cases worked a revolution in the law of school segregation comparable to, indeed more drastic than, that effected by *Brown*". *Id.* (citation omitted); *see also*, ARTHUR SELWYN MILLER, TOWARD INCREASED JUDICIAL ACTIVISM 124-25 (1982) (describing *Green* as "a constitutional revolution of the first magnitude. There were forerunners to *Green* to be sure, but none that used the express words *affirmative duty*.") (emphasis in original).

[181] 391 U.S. 430 (1968).

[182] *Green*, 391 U.S. at 432.

school board then adopted a freedom-of-choice plan, which allowed students to choose annually which school to attend. During the plan's three years of operation, no white student had chosen to attend the all-black Watkins School, and only 15% of the black students were enrolled in New Kent School, the formerly all-white school. In essence, the freedom-of-choice plan had not worked to dismantle the previously segregated school system.[183]

Justice Brennan's opinion for a unanimous Court was short, less than twelve pages, and to the point. His emphasis was on the ultimate goal of "disestablishing" or "dismantling" dual school systems and achieving a "unitary, nonracial system of public education."[184] He stressed the command in *Brown II* to "effectuate a transition to a racially nondiscriminatory school system"[185] and said that it is in light of that mandate that New Kent County's freedom-of-choice plan must be measured.[186]

He further emphasized and admonished the School Board that *Brown II* had placed on school boards and officials "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[187] That burden had not changed, the Justice said: "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*."[188]

While the Court did not assert that freedom-of-choice plans would never work, it made clear that New Kent County's plan was not working where 85% of the black students were totally segregated in an all-black school. The Court served notice that in the future "school plans would be judged not on paper or promise, but on performance."[189]

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[183] *Id.* at 441.

[184] *Id.* at 436.

[185] *Id.* at 435 (quoting *Brown II*, 349 U.S. at 301).

[186] *Id.* at 437.

[187] *Green*, 391 U.S. at 437-38.

[188] *Id.* at 439 (emphasis in original).

[189] J. HARVIE WILKINSON, III, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION, 1954-1978 116 (1979).

Green went far beyond the Court's previous school desegregation rulings by placing the duty to achieve integration directly on local school boards.[190] In its skepticism toward freedom-of-choice, its reliance on statistical evidence, its insistence on results, and its imposition on school boards of an affirmative duty, *Green* mirrored to a great extent Judge John Minor Wisdom's landmark ruling for the Fifth Circuit in *United States v. Jefferson County Board of Education.*[191]

Judge Wisdom's critical premise in *Jefferson County* was that school boards had a positive duty to integrate, not merely to stop segregating.[192] A shift from racial to nonracial criteria in admissions and the presence of a few blacks in formerly all-white schools was not sufficient. The purpose of school desegregation was to redress the damage inflicted on the mass of blacks down through the generations by segregated schools. According to Judge Wisdom, what the state had done, it must undo. Appropriate remedies now required "liquidation of the state's system of *de jure* segregation and the organized undoing of the effects of past segregation."[193]

IV. POST-*GREEN* CONFUSION

By the late 1960s, neither Congress nor the Supreme Court had spoken on whether a state's affirmative duty to create unitary school systems applied to higher education or, if it did, what that duty entailed. Shortly after *Green*, however, lower courts were forced to consider whether creation of a unitary

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[190] *Id.*

[191] 372 F.2d 836 (5th Cir. 1966), *aff'd on reh'g en banc and modified*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967) (per curiam).

[192] *Jefferson County*, 372 F.2d at 896.

[193] *Id.* at 866. Judge Wisdom considered *Jefferson County* to be the most important opinion of his career. JACK BASS, UNLIKELY HEROES 298 (1981). This assessment of *Jefferson County* was shared by Professor Frank Read, a leading student of the Fifth Circuit in the area of desegregation, who described the case as being "one of the four most important school desegregation cases yet decided." Frank T. Read, *Judicial Evolution of the Law of School Integration Since Brown v. Board of Education*, 39 LAW & CONTEMP. PROBS. 7, 23 (1975), *quoted in* WILKINSON, *supra* note 189, at 112, 328 n.196. The three other cases were *Swann*, *Green* and *Brown I*. *Id.* at 328 n.196.

system of "just schools" was the appropriate standard for higher education as well. Given little guidance or direction, judges in this new era of desegregation suits reacted to each other's opinions, their previous experience with desegregation litigation, and their own judgement about the merits of the factual situations in respective cases.

Two of the early cases, *Alabama State Teachers Association v. Alabama Public School and College Authority (ASTA)*,[194] and *Norris v. State Council of Higher Education*,[195] reached the Supreme Court almost immediately. Although the lower courts reached different conclusions on similar fact situations and applied different affirmative duties to higher education, both cases were summarily affirmed.[196] A third case, *Sanders v. Ellington*,[197] moved up and down the lower courts until 1979, when the Sixth Circuit took a position on the scope of the affirmative duty which would subsequently be starkly repudiated by the Fifth Circuit, thus giving rise to the split between these two circuits on this issue.

A. ASTA: The Distinction Between Higher and Lower Education

ASTA was the first decision after *Green* to address the extent of the affirmative duty of a state to disestablish a dual system of higher education. Plaintiffs sought to prevent the State of Alabama from constructing and operating a four-year, degree-granting branch of Auburn University in the City of Montgomery.[198] The proposed site for the branch was close to Alabama State Teachers College, a four-year undergraduate institution previously designated for black students.[199] Plaintiffs argued that since the State of Alabama had historically operated a *de jure* dual system of higher education, which re-

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[194] 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd per curiam*, 393 U.S. 400 (1969).

[195] 327 F. Supp. 1368 (E.D. Va. 1971), *aff'd per curiam sub nom.*, Board of Visitors of the College of William & Mary v. Norris, 404 U.S. 907 (1971).

[196] *ASTA*, 393 U.S. at 400; *Norris*, 404 U.S. at 907.

[197] 288 F. Supp. 937 (M.D. Tenn. 1968).

[198] *ASTA*, 289 F. Supp. at 785.

[199] *Id.* at 786.

mained largely intact, the precedents from elementary/secondary cases imposed on the State an affirmative duty to "utilize new construction or expansion of higher education facilities" to maximize desegregation and effectuate the dismantling of the dual system.[200] Constructing and operating a branch of predominantly and historically white Auburn University within seven miles of predominantly and historically black Alabama State Teachers College, Plaintiffs asserted, would not maximize desegregation, but would serve to increase racial disparity of students and faculty between the two schools.[201]

The three-judge district court judicially noticed that Alabama had traditionally operated a dual system of higher education; found as a fact that the segregated system had not been fully dismantled; and held that the state had an affirmative duty to dismantle the system.[202] The court refused, however, to extend the scope of the duty to desegregate in higher education as far as it had been extended in the elementary/secondary area.[203] Instead, it restricted the affirmative duty to racially neutral admission policies and faculty desegregation.[204]

In its opinion, the court noted that significant differences exist between elementary/secondary public schools and institutions of higher education, which create differences in the role the courts should play in dismantling the dual systems.[205] In

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[200] *Id.* at 787.

[201] Elmer L. Roller, *Racially Identifiable Dual System of Higher Education: The 1971 Affirmative Duty to Desegregate*, 18 WAYNE L. REV. 1069, 1080 (1972).

[202] *ASTA*, 289 F. Supp. at 787. Judge Johnson, writing for the court, relied on the opinion he wrote in Lee v. Macon County Board of Education, 267 F. Supp. 458 (M.D. Ala. 1967), for the proposition that "the State is under an affirmative duty to dismantle the dual system." *ASTA*, 289 F. Supp. at 787.

[203] *ASTA*, 289 F. Supp. at 787. Judge Johnson had broken new ground in Lee v. Macon County Board of Education by extending the scope of the affirmative duty to desegregate to include not just admission decisions, but also the hiring and assignment of teachers so as to desegregate faculty as well as students. This requirement represented a significant departure from the narrower relief ordered in prior cases. *See* Baxter, *supra* note 172, at 8. The only explanation for why the *ASTA* court did not extend the affirmative duty appears to lie in the distinction drawn by the court between elementary/secondary and higher education situations.

[204] *ASTA*, 289 F. Supp. at 787.

[205] *Id.* at 788.

often quoted language, the court said: "Public elementary and secondary schools are traditionally free and compulsory . . . . Higher education is neither free nor compulsory."[206] In addition, the court observed that institutions of higher education differ from one another to a much greater degree than do elementary and secondary schools in their goals, academic standards, facilities and curriculum. Students consider all of these differences as they choose which institution they will attend.[207]

The court acknowledged the Supreme Court's recent decisions in *Green*, and its companion cases,[208] but said:

> [W]e do not interpret those decisions as applying to the operation of an education system on a college level. Freedom to choose where one will attend college, unlike choosing one's elementary or secondary public school, has a long tradition and helps to perform an important function, viz., fitting the right school to the right student.[209]

In conclusion, the court held that "as long as the State and a particular institution are dealing with admissions, faculty and staff in good faith the basic requirement of the affirmative duty to dismantle the dual school system on the college level . . . is satisfied."[210] The Supreme Court affirmed the district court opinion in a memorandum decision with two justices dissenting.[211]

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[206] *Id.*

[207] *Id.*

[208] Monroe v. Board of Comm'rs, 391 U.S. 450 (1968) (finding "free-transfer" plan inadequate to achieve desegregation); Raney v. Board of Educ., 391 U.S. 443 (1968) (finding "freedom of choice" plan insufficient to fulfill affirmative duty).

[209] *ASTA*, 289 F. Supp. at 790.

[210] *Id.*

[211] *Id.* Justice Harlan would have dismissed the appeal for want of jurisdiction on the basis that the Alabama statute authorizing the sale of bonds and use of the proceeds by Auburn University to construct a new branch of that institution in Montgomery was not of "general and statewide application" so as to invoke 28 U.S.C. § 2281. *ASTA*, 393 U.S. at 402 (Harlan, J., dissenting). However, Justice Douglas, noting probable jurisdiction, thought the delineation between higher and lower education in desegregation obligations was "an amazing statement" in view of the fact that many of *Brown's* ancestors were from the field of higher education. *Id.* at 401 n.2 (Douglas, J., dissenting).

B. *Sanders: The Distinction Ignored*

During the same year that *ASTA* was decided, 1968, the District Court for the Middle District of Tennessee reached a completely opposite conclusion from that of *ASTA* with respect to the applicability of *Green* to higher education institutions. In *Sanders*, certain faculty and students of Tennessee A & I State University (TSU), a predominantly black institution, sought to enjoin the University of Tennessee (UT) from constructing a new non-degree granting center in Nashville, arguing that any expansion of UT would detrimentally affect the efforts of TSU, also situated in Nashville, to desegregate its student body and faculty.[212] The United States intervened in the action,[213] going beyond the request of the original plaintiffs for an injunction and requesting, in addition, that the court order the State of Tennessee to present a plan calculated to produce meaningful desegregation throughout its system of public colleges and universities.[214]

Contrary to the relief sought by the private plaintiffs, the court did not require UT to abandon its construction of a new center in Nashville. It found that since UT would offer primarily evening programs and TSU daytime courses, the two schools would compliment, rather than compete with, each other in a manner which would not perpetuate the dual system.[215]

The court, however, refused to base its holding on *ASTA*, specifically rejecting that court's position that a general policy of nondiscrimination was sufficient to satisfy the state's affirmative duty to dismantle its dual system of higher education.[216] Noting that no genuine progress toward integration

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[212] *Sanders*, 288 F. Supp. at 939.

[213] *Id.* Title IX of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000h-2 (1964), authorized the Attorney General to intervene in any action commenced in any court of the United States seeking relief from the denial of equal protection of the laws under the Fourteenth Amendment if the Attorney General certified that the case was of general public importance. 42 U.S.C. § 2000h-2 (1964).

[214] *Sanders*, 288 F. Supp. at 939.

[215] *Id.* at 941.

[216] *Id.* at 942.

had been made in Tennessee higher education institutions with open admission policies, the court ordered the state to submit a plan designed to achieve integration in its public colleges and universities.[217]

The *Sanders* court adopted for higher education the scope of the duty defined in *Green* rather than that defined in *ASTA*:

> Nothing has been shown . . . to indicate that any plan has been proposed, devised or considered to lead to the desegregation of that University (TSU) except the naked fact of an open-door policy. The court is convinced that this policy alone does not discharge the affirmative duty imposed upon the State by the Constitution where . . . there is no genuine progress toward desegregation and no genuine prospect of progress.[218]

The *Sanders* court was the first to hold that a state's duty to desegregate its universities extends beyond the duty to have a nondiscriminatory admissions policy.[219] It was likewise the first to expressly apply the scope of the duty set forth in *Green* to higher education institutions.

The difference between *Sanders* and *ASTA* lies in the precedential value given by the two courts to cases at the elementary/secondary level, mainly *Green*. *ASTA* drew a sharp distinction between the affirmative duty imposed on officials at the lower level and the duty imposed on officials of higher education institutions with respect to desegregation, expressly holding *Green* inapplicable to higher education.[220] *Sanders* held *Green* applicable and relied on *Green* to find an equally broad duty upon state officials to maximize desegregation in

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[217] *Id.*

[218] *Id.*

[219] Note, *State's Affirmative Duty to Desegregate Higher Educational Facilities Not Discharged by Good Faith But Unsuccessful 'Open-Door' Policy*, 82 HARV. L. REV. 1757 (1969); Alexander W. Dobbins, Note, *State Officials' Affirmative Duty to Maximize Desegregation in Higher Educational Institutions Is Not Limited to Non-Discriminatory Admissions*, 15 HOW. L.J. 323, 324 (1969); Note, *Constitutional Law — Desegregation — States Are Required to Take Affirmative Action to Desegregate Higher Education Facilities*, 22 VAND. L. REV. 208, 211 (1968).

[220] *ASTA*, 289 F. Supp. at 790.

higher education institutions.[221]

C. *Norris: Green Is the Standard for Colleges and Universities*

Three years after the district court decisions in *ASTA* and *Sanders*, the Federal District Court for the Eastern District of Virginia decided *Norris*, and put forth a broad formulation of the state's affirmative duty to dismantle formerly segregated systems of higher education.[222] In *Norris*, faculty and students of Virginia State College (VSC), a predominantly black institution, sought to enjoin the escalation of nearby Richard Bland College (RBC), a predominantly white school under the auspices of William and Mary College, from a two-year to a four-year institution;[223] to require its ultimate merger with VSC; and to mandate the formulation of a desegregation plan for every public college and university in Virginia.[224]

Plaintiffs relied on five major contentions: a racially identifiable dual system of higher education still existed in Virginia; the state had an affirmative duty to dismantle this system and convert to a unitary system free of all remnants of racial discrimination; RBC had made unsatisfactory progress in desegregating its faculty and student body; escalation of RBC would impede VSC in its efforts to recruit and hold white students and faculty; and, RBC would duplicate the services and programs offered by VSC since the two schools were situated only seven miles apart.[225] Defendants, relying on the Supreme Court's summary affirmance of *ASTA*, maintained that a combination of good faith admission and employment policies, administered without regard to race, satisfied the state's constitutional obligation to dismantle its previously segregated system

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[221] *Sanders*, 288 F. Supp. at 942.

[222] *Norris*, 327 F. Supp. at 1373.

[223] *Id.* at 1369. At the time of the suit, VSC was the only four-year institution of higher learning in the area, and its enrollment was 97% black. *Id.* at 1370. RBC was a two-year community college with an enrollment of approximately 98% white. *Id.*

[224] *Id.* at 1369.

[225] *Id.* at 1369-72.

of higher education.[226]

The *Norris* court rejected the reasoning of *ASTA* and the contention of defendants that it represented the controlling law in this case:

> We cannot subscribe to the proposition that the Supreme Court represented in a one sentence memorandum decision that it approved every statement in the district court's opinion. The rule is appropriate for the result reached in *Alabama State Teachers Ass'n*, but removed from its context, it does not furnish a universal definition of a state's obligation to abolish a racially dual system of higher education.[227]

The *Norris* court reaffirmed the *Green* mandate charging states "with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch,"[228] and concluded that the affirmative duty established in *Green* applied equally to systems of higher education. "In *Green*, though the Court was dealing with discrimination affecting public school pupils, it defined a constitutional duty owed as well to college students. The means of eliminating discrimination in public schools necessarily differ from its elimination in colleges, but the state's duty is as exacting."[229]

Finding that Virginia was still operating a racially identifiable dual system of higher education and that escalation of predominantly white RBC from a two-year to a four-year institution would frustrate the efforts of its neighbor, predominantly black VSC, to desegregate, the court enjoined the expansion.[230] This was the first time that blacks successfully enjoined the improvement of an all-white state college.[231]

Even though *Norris* reached a different result and a differ-

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[226] *Id.* at 1372.

[227] *Id.*

[228] *Norris*, 327 F. Supp. at 1373 (quoting Green v. County School Bd., 391 U.S. 430, 437 (1968)).

[229] *Id.*

[230] *Id.*

[231] Comment, *Integrating Higher Education: Defining the Scope of the Affirmative Duty to Integrate*, 57 IOWA L. REV. 898 (1972).

ent conclusion of law from *ASTA*, *Norris* was likewise summarily affirmed by the Supreme Court.[232] In affirming *Norris*, the Court made no effort to square the result with *ASTA*, to provide parameters for a state's affirmative duty in higher education, or to examine the differences between elementary/secondary schools and colleges.[233] *Norris* thus stood as another missed opportunity by the Court to clarify the confusion surrounding the meaning of a state's duty to dismantle dual systems of higher education.

For the next fifteen years, confusion reigned. Massive desegregation suits were filed against the states of Louisiana, Mississippi, and Alabama, with no clear legal standard by which to judge their liability or the extent of permissible remedies. Then in 1986, the Supreme Court finally spoke in a decision which did not decisively answer the question, but, at least, provided a talisman around which those who did not believe the mandates of *Green* extended to higher education could rally.

V. An Alternative to *Green*: *Bazemore v. Friday*

In *Bazemore v. Friday*,[234] the North Carolina Extension Service, a division of the School of Agriculture and Life Sciences of North Carolina State University, maintained segregated 4-H and Homemaker Clubs prior to enactment of the Civil Rights Acts of 1964.[235] In response to the Act, the Service discontinued its segregated club policy and opened the clubs "to any otherwise eligible person, regardless of race."[236] Nevertheless, there remained many all-white and all-black clubs.[237] Consequently, employees and members of 4-H and Homemaker Clubs brought suit against the Service, alleging a pattern and practice of racial discrimination in employment and provision

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[232] *ASTA*, 393 U.S. 400 (1969) (per curiam); *Norris*, 404 U.S. 907 (1971) (per curiam).

[233] Preer, *supra* note 33, at 180.

[234] 478 U.S. 385 (1986).

[235] *Bazemore*, 478 U.S. at 407 (White, J., concurring).

[236] *Id.*

[237] *Id.*

of services in violation of the Constitution and certain federal statutes.[238] The United States intervened.[239]

After a lengthy trial, the district court entered judgment for respondents in all respects and the Court of Appeals for the Fourth Circuit affirmed.[240] Both the private petitioners and the United States appealed certain employment related aspects of the case. The private petitioners also appealed the rejection of their claim that respondents unlawfully provided services and materials to segregated 4-H and Homemaker Clubs, framing that question as follows: "May North Carolina satisfy its obligation to desegregate the *de jure* system of 4-H Clubs and Extension Homemaker Clubs by adopting a freedom of choice plan that fails?"[241] The United States did not appeal the decisions of the district and circuit courts on this issue.[242]

The district court found no evidence of any discrimination after 1964 and concluded that any current racial imbalance existing in any of the clubs "was the result of wholly voluntary and unfettered choice of private individuals."[243] The court of appeals upheld the findings of the district court and affirmed.[244] In a 5-4 decision, the Supreme Court also affirmed, saying: "In view of the District Court's findings, this case presents no current violation of the Fourteenth Amendment since the Service has discontinued its prior discriminatory practices and has adopted a wholly neutral admissions policy. The mere continued existence of single-race clubs does not make out a constitutional violation."[245]

Distinguishing the circumstances in *Bazemore* from those in *Green*, the majority noted that membership in the 4-H and

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[238] *Id.* at 385.

[239] *Id.* at 391. Intervention was pursuant to section 902 of Title IX and sections 601 and 602 of Title VI of the Civil Rights Act of 1964. *Id.*

[240] *Bazemore*, 478 U.S. at 386.

[241] *Id.* at 393, n.4.

[242] *Id.*

[243] *Id.* at 407.

[244] *Id.* at 408.

[245] *Id.* (White, J., concurring). Justice White was joined by Chief Justice Burger and Justices Powell, Rehnquist and O'Connor in a concurring opinion on the 4-H/Homemaker part of the case. *Id.* at 407. This concurring opinion was incorporated into the court's overall per curiam opinion. *Id.* at 387.

Homemaker Clubs "is entirely voluntary," as opposed to compulsory public school education.[246] The Court further noted that while school boards have the power to create school attendance areas and designate the school students must attend, "there is no statutory or regulatory authority to deny a young person the right to join any Club he or she wishes to join."[247]

The Court specifically found *Green* to be inapplicable to the voluntary associations supported by the Extension Service, stating "however sound *Green* may have been in the context of the public schools, it has no application to this wholly different milieu."[248] In short, the Court found that discontinuing prior discriminatory practices and adopting neutral admission policies is all the Constitution requires.[249]

Petitioners argued that Department of Agriculture regulations required that the Extension Service "take 'affirmative action' to overcome the effects of prior discrimination in its programs."[250] The majority dismissed this position, saying "the Service has taken affirmative action to change its policy and to establish what is concededly a nondiscriminatory admissions system . . . ."[251] Justice White noted the United States position that the Extension Service had fully complied with the regulation, thus, "[i]n view of the deference due the Department's interpretation of its own regulation, we cannot accept petitioner's submission that the regulation has been violated."[252]

Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, dissented strongly, criticizing the majority for joining the Extension Service "in winking at the Constitution's requirement that States end their history of segregative practices."[253] Justice Brennan further criticized Justice White's

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[246] *Bazemore*, 278 U.S. at 408 (White, J., concurring).

[247] *Id.*

[248] *Id.*

[249] *Id.*

[250] *Id.*

[251] *Bazemore*, 278 U.S. at 409 (White, J., concurring).

[252] *Id.*

[253] *Id.* (Brennan, J., dissenting).

"terse opinion" which offered "only feeble excuses for this departure from the Court's historic commitment to the eradication of segregation in this country."[254]

Questioning the majority's holding that *Green* did not apply to the Extension Service clubs, Justice Brennan argued, "[w]hile I agree that the remedy ultimately provided might properly vary in different contexts, I can see no justification in logic or precedent for relieving the State of the overall obligation to desegregate in one context while imposing that obligation in another."[255] Rejecting the majority's basis for its holding on the non-compulsory nature of the activities in question, he further said

> Nothing in our earlier cases suggests that the State's obligation to desegregate is confined only to those activities in which members of the public are compelled to participate. On the contrary, it is clear that the State's obligation to desegregate formerly segregated entities extends beyond those programs where participation is compulsory to voluntary public amenities such as parks and recreational facilities.[256]

Justice Brennan also addressed the governing regulations for Title VI, which require that in administering a program where the recipient has previously discriminated against persons on the basis of race, "the recipient must take affirmative action to overcome the effects of prior discrimination."[257] Justice Brennan disagreed with the position of the majority that a mere change in policy constitutes affirmative action because "[i]t is absurd to contend that the requirement that States take 'affirmative action' is satisfied when the Extension Service simply declares a neutral admissions policy and refrains from illegal segregative activities."[258]

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[254] *Id.* at 409-10.

[255] *Id.* at 419.

[256] *Bazemore*, 278 U.S. at 418 (citations omitted) (Brennan, J., dissenting).

[257] *Id.* at 412 (quoting 7 C.F.R. 15.3(b)(6)(i) (1985)).

[258] *Id.* at 414.

VI. *GREEN* OR *BAZEMORE*? "FREEDOM OF CHOICE" ARRIVES IN THE CIRCUITS

The Court did not discuss higher education in *Bazemore*, nor did it address the applicability of its decision to public colleges and universities. The case, however, arose from the context of a non-compulsory, state-sponsored educational program[259] and provided a "freedom of choice" to the lower courts grappling with just what policies, practices and procedures were sufficient to satisfy constitutional mandates to disestablish segregation in higher education institutions. From the resulting choices made by the Fifth and Sixth Circuits as to whether *Green* or *Bazemore* defined the scope of the affirmative duty to desegregate in these institutions came the conflict presented to the Supreme Court in *Ayers*.

A. The Sixth Circuit Chooses Green

After fifteen years of litigation growing out of *Sanders v. Ellington*,[260] a suit filed in 1968 seeking desegregation of public institutions of higher learning in Tennessee, all parties except the United States entered into a consent decree approving the use of preferential "racial quotas" to aid in eliminating residual effects of *de jure* segregation.[261] The Department of Justice argued that the quotas deprived nonminority students of equal protection.[262]

The Justice Department also insisted that *Green*'s mandate requiring the elimination of all vestiges of past discrimination

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[259] *Id.* at 410. Justice Brennan in dissent detailed the substantial educational purposes of the agricultural extension program and specifically characterized the 4-H and Youth Program as "one of the major educational programs of the Extension Service." *Id.*

[260] 288 F. Supp. 937 (M.D. Tenn. 1968), *enforced sub nom.*, Geier v. Dunn, 337 F. Supp. 573 (M.D. Tenn. 1972), *modified sub nom.*, Geier v. Blanton, 427 F. Supp. 644 (M.D. Tenn. 1977), *aff'd sub nom.*, Geier v. University of Tenn., 597 F.2d 1056 (6th Cir.), *cert. denied*, 444 U.S. 886 (1979).

[261] Geier v. Alexander, 593 F. Supp. 1263, 1264 (1984). For example, the agreement set a goal that the Tennessee State University student body would consist of 50% white undergraduate full-time students by 1993. *Id.* at 1269.

[262] Geier v. Alexander, 801 F.2d 799, 804 (6th Cir. 1986).

"root and branch" did not apply to higher education. Further, "since higher education is a voluntary activity, a state satisfies the Constitution by putting an end to discriminatory practices, and has no obligation to eliminate the vestiges of past discrimination."[263] The principal authority relied upon by the Department of Justice was *Bazemore*.[264]

The Sixth Circuit declined to find *Bazemore* controlling and reaffirmed its earlier decision in *Geier* that *Green* was the law of the case:

> [T]he *Green* requirement of an affirmative duty applies to public higher education as well as to education at the elementary and secondary school levels. Nothing in the *Bazemore* decision, where the compelling interest of a state in the education of its citizenry was not involved, requires us to reexamine these holdings.[265]

Rooting its opinion in the distinction between "clubs" dealt with in *Bazemore* and "education" in *Green*, the Sixth Circuit said:

> It appears fallacious to attempt to extend *Bazemore* to any level of education. While membership in 4-H and Homemaker Clubs offers a valuable experience to young people and families, particularly in rural areas, it cannot be compared to the value of an advanced education. The importance of education to the individual and the interest of the state in having its young people educated as completely as possible indicate clearly that the holding in *Green* rather than that of *Bazemore* applies.[266]

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[263] *Geier*, 801 F.2d at 804.

[264] *Id.*

[265] *Id.* at 805 (quoting Geier v. University of Tenn., 597 F.2d 1056, 1065 (6th Cir. 1979)).

[266] *Id.* at 805. The reasoning of the Sixth Circuit in distinguishing *Bazemore* because higher education is of greater value than high school clubs was later criticized by the Fifth Circuit. Ayers v. Allain, 914 F.2d 676, 686 (5th Cir. 1990).

B. The Fifth Circuit Chooses Bazemore

1. Ayers v. Allain

Though traveling a far more tortuous path in reaching its ultimate decision on the scope of the affirmative duty of public higher education institutions to desegregate, the Fifth Circuit did at last arrive. Choosing *Bazemore* over *Green* as the standard by which to measure the states of Louisiana and Mississippi, this court, sitting en banc, affirmed the district court's dismissal of *Ayers v. Allain,*[267] a fifteen year-old case involving desegregation of eight public colleges and universities in Mississippi. *Ayers*, in turn, was held to be dispositive of the issues in *United States v. Louisiana,*[268] a similar case of sixteen years duration, which was subsequently dismissed.

Because of the importance of the Fifth Circuit's decision in *Ayers* and the ultimate importance of the Supreme Court's reversal of that decision, it is necessary to examine in some detail the procedural history and legal reasoning of the district court (*Ayers I*),[269] the Fifth Circuit panel reversing the district court (*Ayers II*), [270]and en banc court vacating the panel decision and affirming the district court (*Ayers III*).[271]

This lawsuit began in 1975 when a group of plaintiffs sued the Governor of Mississippi, the Board of Trustees of State Institutions of Higher Learning, and other state education officials, alleging that defendants were maintaining and perpetuating a racially dual system of public higher education in violation of the Equal Protection Clause of the Fourteenth

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[267] 914 F.2d 676 (5th Cir. 1990) (en banc), *vacated sub nom.*, United States v. Fordice, 112 S. Ct. 2727 (1992).

[268] 692 F. Supp. 642 (E.D. La. 1988), *vacated*, 751 F. Supp. 606 (E.D. La. 1990), *order reinstated*, No. CIV.A. 80-3300, 1992 WL 407330 (E.D. La. Dec. 23, 1992).

[269] Ayers v. Allain, 674 F. Supp. 1523 (N.D. Miss. 1987).

[270] Ayers v. Allain, 893 F.2d 732 (5th Cir. 1990).

[271] Ayers v. Allain, 914 F.2d 676 (5th Cir. 1990)(en banc), *vacated sub nom. and remanded*, United States v. Fordice, 112 S. Ct. 2727 (1992).

Amendment and Title VI of the Civil Rights Act of 1964.[272]

Specifically, plaintiffs claimed that since the time of *Brown*, the defendants had perpetuated a dual system of higher education in which there were separate institutions for blacks and whites, and in which the black institutions were "markedly inferior" to the white institutions.[273] The complaint alleged that the historically black institutions (HBIs) remained separate and inferior to the historically white institutions (HWIs) due to the defendants discriminatory practices on student admissions, employment of faculty and staff, mission designations and funding, and operation of HWIs in close proximity to HBIs.[274] Plaintiffs further asserted that defendants had failed in their affirmative duty to eliminate vestiges of segregation and remained, therefore, under a continuing "legal obligation to eliminate the vestiges of racial dualism 'root and branch'."[275]

Defendants answered the allegations of plaintiffs by contending that a good-faith, nondiscriminatory admission and operation policy with respect to students, faculty and staff had been implemented and that with such a policy designed to insure equality of opportunity, the mere continued existence of institutions with predominantly black and predominantly white student bodies did not represent a denial of equal protection.[276] Defendants further maintained that any racial identifiability was the result of the unfettered freedom of choice of students themselves as they considered varying educational objectives and advantages of the respective institutions.[277]

In the spring of 1987, following twelve years of pretrial preparation, the district court conducted a five week trial.[278] The record consisted of testimony from 71 witnesses and 56,700 pages of exhibits.[279] The district court ruled for the defendants

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[272] *Ayers I*, 674 F. Supp. at 1525.
[273] *Id.*
[274] *Id.*
[275] *Id.*
[276] *Id.*
[277] *Ayers I*, 674 F. Supp. at 1525.
[278] *Id.* at 1526.
[279] *Id.*

on the issue of liability and dismissed plaintiffs' case.[280]

In arriving at its decision, the district court noted that from the time of *Brown* and until 1962 when the Fifth Circuit Court of Appeals ordered the University of Mississippi to admit James Meredith as a student,[281] the Board of Trustees had continued to operate a racially dual system of higher education which was "both separate and unequal."[282] However, "[t]he fundamental issue before the court at this time," according to Judge Neal Biggers, "is whether the defendants are *currently* committing violations of the Thirteenth and Fourteenth Amendments, Title VI and 42 U.S.C. 1981."[283]

Judge Biggers found that since 1962 defendants had in good faith adopted racially neutral admission policies at all public colleges and universities, had utilized affirmative efforts to recruit and retain other-race students, and had satisfied "their affirmative duty to dismantle the former segregated system insofar as the duty pertains to student enrollment."[284] "Although the various institutions continue to be identifiable by the racial makeup of the student populations, this is not a substantial result of current admission practices and procedures but is instead the result of a free and unfettered choice on the part of individual students."[285]

The district court further found that defendants had adopted racially neutral hiring policies with respect to faculty and staff at each university and had expended substantial affirmative efforts each year attempting to attract and employ other-race faculty. The court noted that since 1974, the percentage of blacks hired in faculty and staff positions exceeded the black representation in the qualified labor pool and held that defendants had "satisfied their affirmative duty to dismantle the former segregated system as it pertains to faculty and staff

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[280] *Id.* at 1564.

[281] *See* Meredith v. Fair, 305 F.2d 341 (5th Cir. 1962), *cert.denied*, 371 U.S. 828 (1962); Meredith v. Fair, 313 F.2d 534 (5th Cir. 1962).

[282] *Ayers I*, 674 F. Supp. at 1528.

[283] *Id.* at 1551 (emphasis added).

[284] *Id.* at 1558.

[285] *Id.*

employment."[286]

Likewise, the court found the mission designations of the respective institutions to be educationally sound, based on nondiscriminatory purposes, and justified by a need to conserve scarce educational resources.[287] In summary, the court dismissed the case because it found that the defendants were fulfilling "their affirmative duty to disestablish the former *de jure* segregated system of higher education"[288] and that there was no proof in the record "of current violation of the Constitution or Statutes of the United States by the defendants."[289]

In making these factual findings, Judge Biggers applied the remedial standard set forth in *Bazemore* and *ASTA* instead of the more expansive duty defined by the Sixth Circuit in *Geier v. Alexander*. In so doing, he measured Mississippi's affirmative duty to dismantle its racially dual system of higher education by determining whether the state had implemented in good faith nondiscriminatory policies and procedures.[290] He did not impose upon the state the further obligation of achieving any specified degree of racial balance in its public colleges and universities.

The district court judge rested his decision to apply the *ASTA/Bazemore* standard upon the element of free choice available in higher education, distinguishing it from the compulsory nature of elementary/secondary schooling.

> As is apparent from a contextual reading of *Green* and subsequent Supreme Court and lower court decisions considering the nature and extent of the state's duty to desegregate at the elementary and secondary level, the affirmative duty as delineated in these cases rests upon the traditional power vested in local school authorities to dictate attendance patterns in compulsory elementary/secondary school systems, that is, to order certain students to attend certain schools. The circumstances in the higher education field, however, are differ-

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[286] *Id.* at 1563.

[287] *Ayers I*, 674 F. Supp. at 1561.

[288] *Id.* at 1564.

[289] *Id.*

[290] *Id.*

ent.[291]

Judge Biggers then distinguished the affirmative duty of the state to bring about integration in elementary/secondary schools as opposed to colleges/universities. "Where 'choice' is traditionally controlled by the state, in elementary and secondary education, the state is required to exercise its control in a way which maximizes the racial integration of component institutions."[292] The success or failure of the state in desegregating elementary/secondary schools is then measured by the results achieved because the state has direct official control over attendance decisions.[293]

"In the college and university education context, however, where individuals have traditionally enjoyed free choice as to whether and when to attend school," courts have not measured the success or failure of a state's efforts to abolish dual systems of higher education by measuring the relative degree of integration in each of its public colleges and universities.[294] The wisdom of this approach, said Judge Biggers, rests on the qualitative distinctions existing between post-secondary and elementary/secondary education systems.

> Elementary and secondary schools in a single district tend to be fungible in the sense that they generally strive towards uniformity in offerings, facilities and services. The opposite is true in higher education. A special emphasis is placed upon the relative uniqueness of the separate institutions comprising a public system of higher education. Indeed, the uniqueness of institutions which results from the confluence of course offerings, services, size, location, faculty and students found at each institution, explains why freedom of choice is so valued and why the courts have not required the restriction of student choice in higher education.[295]

Measuring the current actions of the defendants against

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[291] *Id.* at 1552.
[292] *Ayers I*, 674 F. Supp. at 1552.
[293] *Id.* at 1554.
[294] *Id.*
[295] *Id.*

the remedial standards of *ASTA* and *Bazemore*, the district court found that the State of Mississippi had fulfilled its affirmative duty to disestablish the former *de jure* segregated system of higher education and dismissed the case.[296] From this dismissal, plaintiffs appealed.

The Fifth Circuit panel reversed and remanded for remedial proceedings.[297] The divided panel specifically rejected the district court's reading of the mandates of *Green*[298] and adopted instead the interpretation applied by the Sixth Circuit in *Geier v. Alexander*, holding that "a state has an affirmative duty to eliminate all of the 'vestiges' of *de jure* segregation, root and branch, in a university setting."[299]

Writing for the panel majority, Judge Goldberg traced the evolution of *Plessy* through the graduate school cases to *Brown*.[300] In moving, impassioned language,[301] he described the message of *Brown I* to be that "constitutional doctrine must commandeer a social mission to eradicate the stigma conveyed through racial separation by law,"[302] and the message of *Brown II* to be that all effects of *de jure* segregation must be removed. "Otherwise, the perceptions of black students would remain distorted and the moral aspirations of 'separate is inherently unequal' — the attainment of human dignity for all —

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[296] *Id.* at 1564.

[297] Ayers v. Allain, 893 F.2d 732, 756 (5th Cir. 1990) (*Ayers II*).

[298] *Ayers II*, 893 F.2d at 744. The Fifth Circuit panel described the district court's application of the law as being based on "an alternative reading of *Green*," which "requires a state to implement, in good faith, race neutral policies and procedures instead of uprooting the vestiges of segregation root and branch." *Id.* at 743.

[299] *Id.* at 744 (quoting Geier v. Alexander, 801 F.2d 799, 804 (6th Cir. 1986)).

[300] *See supra* notes 19-146 and accompanying text.

[301] *See, e.g.*, *Ayers II*, 893 F.2d at 749. Examples of the intensity with which Judge Goldberg wrote are: "*Plessy* is thus a decision that maintains the status quo perceptions of a prejudiced society. The Court failed to begin to bring these perceptions in line with the message of the Civil War that blacks were equal to white." *Id.* at 746. "*McLaurin* thus recognized that constitutional doctrine might alter societal values unlike the *Plessy* decision which maintained them. In effect, *Plessy* was dead. The Court in *Brown* was now free to etch a tombstone for the grave of separate but equal dug by *Gaines*, *Sweatt*, and *McLaurin*." *Id.* at 749.

[302] *Id.*

would be impugned."[303]

Turning in his analysis to *Green*, Judge Goldberg wrote:

> Under *Green* the creation of a unitary school system is the goal, a goal tantamount to the elimination of the effects of *de jure* discrimination, root and branch. If a less demanding standard were adopted, images of inferiority would be memorialized with the force of law, contrary to the vision of *Brown*, because vestiges of discrimination would remain unaddressed. *Brown* commands the application of *Green* in all of its fertility to the public university forum.[304]

He then sharply criticized the district court's interpretation of *Green* as requiring only that a state implement in good faith, race-neutral policies and procedures in order to discharge its constitutional responsibilities, and the district court's holding that the open admissions policy of Mississippi's public universities satisfied that standard.[305] It assumes:

> [B]lack students possess the same freedom to choose as do white students. Contrary to *Brown*, however, this assumption ignores the effects of past *de jure* segregation . . . .
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> *Brown* explicitly recognized that vestiges of *de jure* segregation distort the perceptions of blacks. Blacks do not, therefore, make choices from a tabula rasa. Instead, they choose against a history of racial subjugation with its attendant messages of inferiority.[306]

The opinion then criticized the district court and the five member majority in *Bazemore* for finding the searching inquiry of *Green* applicable only if attendance at a particular institution is legally compelled. "*Brown* stated that the stigmatizing effects of segregation are not created by legally compelled attendance but rather from the vestiges of legally compelled separation. Thus the lesson of *Brown* is that the malignancy of apartheid does not vanish in state-sponsored forums simply

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[303] *Id.* at 750.

[304] *Id.*

[305] *Id.*

[306] *Ayers II*, 893 F.2d at 751.

because attendance is voluntary and admittance race-neutral."[307]

Following the Fifth Circuit panel's holding that defendants had not satisfied their affirmative duty under *Green*,[308] the Fifth Circuit Court of Appeals granted a suggestion for rehearing en banc.[309] On rehearing, a divided court vacated the panel decision and affirmed the district court, concluding that "Mississippi has adopted and implemented race neutral policies for operating its colleges and universities and that all students have real freedom of choice to attend the college or university they wish . . . ."[310]

In reaching this result, the court first analyzed the scope of Mississippi's duty to remedy the effects of past *de jure* discrimination. At the outset, it remarked that a state's "precise constitutional obligation" as to its higher education system had not been "so clearly defined as in cases involving primary and secondary education," where school authorities had been charged by *Green*, *Swann* and *Milliken*, with eliminating all vestiges of state imposed segregation and taking whatever steps are necessary to convert to a unitary system.[311] Outside the elementary/secondary context, however, a different standard was set forth in *Bazemore* requiring the governing authorities only to discontinue prior discriminatory practices and adopt in good faith racially-neutral policies.[312]

The en banc majority determined that, because of the free-choice/non-compulsory nature of education at the post-secondary level, *Bazemore* provided the proper standard for desegregation of public universities, and that Mississippi had satisfied

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[307] *Id.*

[308] *Id.* at 756.

[309] Ayers v. Allain, 898 F.2d 1014 (5th Cir. 1990).

[310] *Ayers III*, 914 F.2d at 678.

[311] *Id.* at 682; *see* Milliken v. Bradley, 433 U.S. 267, 289-90 (1977); Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971); Green v. County Sch. Bd., 391 U.S. 430, 437-48 (1968).

[312] *Ayers III*, 914 F.2d at 682; *see* Bazemore v. Friday, 478 U.S. 385, 408 (1986); *see also* Alabama State Teachers Ass'n v. Alabama Public School and College Auth., 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd per curiam*, 393 U.S. 400 (1969).

that standard.[313] "We therefore hold that to fulfill its affirmative duty to disestablish its prior system of *de jure* segregation in higher education, the state of Mississippi satisfies its constitutional obligation by discontinuing prior discriminatory practices and adopting and implementing good-faith, race-neutral policies and procedures."[314]

2. *United States v. Louisiana*

As a result of the *Adams* litigation,[315] the Department of Health, Education and Welfare requested in 1969-70 that the State of Louisiana, along with nine other Southern states, submit a plan for desegregation of its public colleges and universities. Maintaining that it did not operate a dual system of higher education based on race, Louisiana refused to do so. As a result, the Attorney General of the United States filed suit against the State and its various higher education governing boards on March 14, 1974, alleging that Louisiana maintained and perpetuated a segregated system of higher education in violation of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.[316]

In 1981, the parties entered into a consent decree, which was approved by the United States District Court for the Eastern District of Louisiana.[317] Under the terms of the decree, defendants agreed to: (1) increase other-race representation on its higher education governing boards so that membership of each board would reflect the racial composition of the state's population; (2) retain the State's open admission policy for a

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[313] *Id.* at 687.

[314] *Id.* Both the private plaintiffs and the United States filed Petitions for Writ of Certiorari, which the Supreme Court granted; *see* United States v. Mabus, 111 S. Ct. 1579 (1991). As discussed later in this issue, the Supreme Court vacated and remanded *Ayers III* in United States v. Fordice, 112 S. Ct. 2727 (1992).

[315] *See supra* notes 147-71 and accompanying text.

[316] United States v. Louisiana, 527 F. Supp. 509, 512-13 (E.D. La. 1981). For a good discussion of the background of the Louisiana litigation, see Miller, *supra* note 49, at 585-629.

[317] *Id.* at 513. For earlier history of the case, see United States v. Louisiana, 543 F.2d 1125 (5th Cir. 1976); United States v. Louisiana, 90 F.R.D. 358 (E.D. La. 1981), *aff'd*, 669 F.2d 314 (5th Cir. 1982).

period of six years[318] and actively recruit and retain other-race students; (3) administer a scholarship fund to enable other-race students to attend institutions they could not otherwise afford; (4) employ black faculty, administrators and staff in proportion to the number of qualified blacks in the relevant labor market and increase the proportion of white faculty, administrators and staff employed at predominantly black institutions; (5) allocate $300,000 a year to provide Grambling and LSU faculty paid leaves to complete terminal degrees; (6) increase appropriations for the historically black institutions; (7) amend the appropriations formula for Southern University Law School to assure parity with appropriations for the LSU Law Center; (8) provide one million dollars each year for capital improvements at the historically black institutions and $285,000 for Southern University Law School; (9) create cooperative programs and eliminate unwarranted program duplications between the historically black and historically white institutions; and (10) terminate the jurisdiction of the court on December 31, 1987, unless the United States moved to declare that Louisiana was in violation of the decree.[319]

On December 29, 1987, the United States moved to have a judicial determination of whether Louisiana had fully implemented all provisions of the consent decree and was operating a unitary system of public higher education.[320] Motions for summary judgment were filed by both sides and the matter was heard by a three-judge court.

The court found that even though the admission policies to Louisiana's public institutions of higher learning were open to all high school graduates and completely non-discriminatory, the racial identifiability of Louisiana's public colleges and universities was even more pronounced than before the consent decree.[321] Writing for the court, Judge Schwartz said: "Con-

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[318] United States v. Louisiana, 718 F. Supp. 499, 515-17 (E.D. La. 1989). Louisiana had an open admission policy whereby any graduate of a Louisiana high school could enter any of the state's public colleges or universities without meeting any minimum ACT or SAT score.

[319] Consent Decree, United States v. Louisiana, CA-80-3300 at 29.

[320] United States v. Louisiana, 692 F. Supp. 642, 644 (E.D. La. 1988).

[321] *Louisiana*, 692 F. Supp. at 657-58. The court noted that the "four state

trary to the Court's earlier expectations, the consent decree as implemented has proved no viable solution. If anything, the consent decree has exacerbated the segregation; many of the schools are more racially polarized now than they were just before the consent decree was implemented in 1981."[322]

The court took notice that the State of Louisiana had spent more than $200 million toward achieving the goals of the decree during the previous six years and concluded that the apparent failure to obtain the desired results was not because the State had spent too little, but rather was due to the structure of the decree. "The consent decree as implemented was directed more towards merely enhancing the state's black schools as black schools rather than towards 'convert[ing] its white colleges and black colleges to just colleges."[323]

In determining the applicable legal standard for defining the scope of the state's duty to desegregate its universities and colleges, the court acknowledged the dispute over whether this duty is as broad in higher education as at the elementary/secondary level.[324] Rejecting the narrow approach represented by the *Bazemore*, *ASTA* and *Ayers* line of cases, the court adopted the more expansive duty required by *Green*, *Geier I*, *Geier II*, and *Norris*.[325]

Specifically, the court found the rationale of *Green* to carry "the same force in the higher education context as it does in the primary and secondary education context . . . . When open admissions alone fail to disestablish a segregated school system, be it a primary/secondary school system or a college system, then something more is required."[326] Acknowledging that busing and mandatory attendance zones are not available solutions in the higher education context, the court said: "[I]t does not follow, however, that nothing beyond open admissions is

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universities that were established as black schools remain from 87% to 97% black; those white, from 74% to 96% white." *Id.* at 657.

[322] *Id.* at 657-58.

[323] *Id.* at 658.

[324] *Id.* at 654.

[325] *Id.* at 656.

[326] *Louisiana*, 692 F. Supp. at 656.

required to dismantle the dual system."[327]

Applying the *Green*, *Geier I*, *Geier II*, and *Norris* standard, the court found that Louisiana's open admissions, freedom-of-choice policy was insufficient to demonstrate that it was not operating an unlawful dual higher education system based on race.[328] The court then held that Louisiana was in violation of Title VI, granted the motion of the United States for partial summary judgment, and set a hearing on the issue of remedies required to achieve a unitary system.[329]

Dr. Paul R. Verkuil, President of the College of William and Mary, was appointed as Special Master by the court.[330] His report and recommendations were adopted in large part by the reconvened three-judge court in its Opinion and Order of July 19, 1989.[331] Among other remedies, the Order called for the following actions:

(1) Elimination of the four governing boards and organization of the state's higher education system under one central, unified board;

(2) Reclassification of all public universities according to mission designations, with LSU designated as the state's flagship and major research university;

(3) Ending of open admissions to all state universities and implementation of selective admission criteria to certain of the institutions;[332]

(4) Creation of a community college system to insure remedial education of individuals who might be excluded from four-year institutions under the new selective admission stan-

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[327] *Id.*

[328] *Id.* at 657.

[329] *Id.* at 658-69.

[330] CHRONICLE OF HIGHER EDUCATION, Nov. 7, 1990, at A1.

[331] United States v. Louisiana, 718 F. Supp. 499, 502 (E.D. La. 1989).

[332] *Id.* at 510. The court said the following about the tradition of open admissions to all of Louisiana's public higher education institutions:

> The current practice of open admissions to all four-year institutions is counter-productive, both in terms of educational objectives and racial integration. The objective is not simply to admit students into college, but to educate and graduate them. In terms of undergraduate degree productivity, the Louisiana open admissions system is a failure.

Id.

dards;

(5) Reduction of excessive program duplication;

(6) Merger of the state's two public law schools, LSU and Southern University, both located a few miles apart in the state capital of Baton Rouge.

Defendants appealed to the Court of Appeals for the Fifth Circuit from the district court decisions on liability and remedy.[333] On September 28, 1990, the Fifth Circuit sitting en banc announced its decision upon rehearing in *Ayers III*, which was dispositive of all issues in the Louisiana case.

As a result of the decision in *Ayers*, Judge Schwartz vacated the three-judge court's earlier order reorganizing the Louisiana higher education system.[334] He said, "Respectfully disagreeing with the majority's conclusion in *Ayers v. Allain*, this court nevertheless finds that *Ayers* is both binding and controlling in this cause . . . . Accordingly, the court vacates its Order of August 2, 1988 . . . ."[335] The United States and Southern University appealed from that order to the Fifth Circuit. Those appeals, plus various cross-appeals, were stayed by the Fifth Circuit.[336]

C. The Eleventh Circuit Starts Over Again

1. United States v. Alabama I

The desegregation practices of the State of Alabama, curi-

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[333] Prior to that appeal, various parties took direct appeals of the three-judge district court's decision to the United States Supreme Court, which dismissed for lack of jurisdiction. Louisiana *ex rel.* Guste v. United States, 493 U.S. 1013 (1990); Board of Supervisors of Southern Univ. v. United States, 493 U.S. 1013 (1990); Louisiana *ex rel.* Roemer v. United States, 493 U.S. 1013 (1990).

[334] United States v. Louisiana, 751 F. Supp. 606, 608 (E.D. La. 1990). Judge Schwartz had written the opinion for the three-judge court in United States v. Louisiana, 718 F. Supp. 499 (E.D. La. 1990).

[335] *Louisiana*, 751 F. Supp. at 608.

[336] United States v. Louisiana, CA-90-3874. Subsequent to the Court's decision in *United States v. Fordice*, the Louisiana district court reinstated its August 2, 1988 Order as the final "Remedial Order" in the Louisiana higher education case. United States v. Louisiana, No. CIV.A. 80-3300, 1993, WL 407330 (E.D. La., Dec. 23, 1992). The only significant change made by the district court from its 1988 order was the abandonment of its previous mandate to merge the law schools of Southern University and L.S.U. *Id.* at 19, n.54.

ously, were not challenged by HEW until ten years after those of Mississippi, Louisiana, and the other states encompassed within the massive *Adams* litigation.[337] It was 1978 before the Office of Civil Rights (OCR) began a Title VI compliance investigation of public higher education in Alabama and 1981 before notice was given the Governor of the finding that there remained vestiges of a prior, racially dual system of higher education in the state in violation of Title VI of the Civil Rights Act of 1964. After months of unsuccessful negotiations over a statewide remedial plan, the United States filed suit on July 11, 1983.[338]

The complaint charged that Alabama had historically maintained a system of higher education segregated by law; that the state had perpetuated the racially dual system since 1953 by pursuing policies and practices that resulted in the segregation by race of student bodies, faculties, staff, and governing boards; and that the state should, therefore, be required to develop and implement a plan to eliminate the vestiges of this racially dual system of public higher education.[339]

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[337] *See supra* notes 147-71 and accompanying text. There is a suggestion that the political clout of George Wallace during the early years of HEW's enforcement activity prevented an investigation of Alabama at that time. PREER, *supra* note 33, at 197.

[338] United States v. Alabama, 628 F. Supp. 1137 (N.D. Ala. 1985), *rev'd*, 828 F.2d 1532 (11th Cir. 1987).

[339] *Alabama*, 628 F. Supp. at 1140. In 1981, John F. Knight, Jr., and other students, graduates, faculty, and employees of Alabama State University, a historically black institution, filed an action under 42 U.S.C. § 1981 and § 1983 claiming that the continued existence of vestiges of past racial segregation in public higher education in the Montgomery area violated Title VI and the Fourteenth Amendment. Knight v. James, 514 F. Supp. 567, 568 (M.D. Ala. 1981). After instigation of *Alabama*, the private plaintiffs in *Knight* were permitted to intervene since the outcome of that litigation would be determinative of the issues in their case. *Alabama*, 628 F. Supp. at 1140.

The district court also realigned Alabama A & M (A&M) and Alabama State University (ASU), defendants in *United States v. Alabama*, as plaintiffs and permitted those historically black institutions to assert claims under Title VI and the Fourteenth Amendment against the State of Alabama. *Id.*

On appeal, the Eleventh Circuit held that ASU and A&M were instrumentalities created by the state and, as such, lacked standing to assert these Fourteenth Amendment claims under section 1983 against the state. United States v. Alabama, 791 F.2d 1450, 1456 (11th Cir. 1986), *cert. denied sub nom.*, Board of Trustees v. Alabama Bd. of Educ., 479 U.S. 1085 (1987).

After extensive discovery and numerous pre-trial motions, including one to have the trial judge disqualified from the case, a month-long trial was held before Judge U. W. Clemon in July 1985. In a ninety-nine page opinion, the district court found that the State of Alabama had operated a dual system of higher education until at least 1967; had historically provided far less funding to black schools than to white; had taken various actions which stymied the growth and development of historically black Alabama A & M and Alabama State University; had maintained colleges and universities easily identifiable by race in student bodies, faculty, and governing boards; and continued to operate a system in which the vestiges of prior segregation had not been eliminated.[340]

Appeal was taken on several procedural grounds, as well as on the merits of the case. As a result of the court's rulings on the procedural issues, it did not reach the merits of the district court's decision.[341]

In 1983, Auburn University moved to disqualify Judge Clemon, asserting that his two minor children were members of the plaintiff class,[342] that his background as a civil rights lawyer was evidence of his prejudice in the case,[343] that his views expressed while he was a member of the state senate indicated strong support for minority individuals and institutions,[344] and that his active participation as a member of the Alabama legislature in certain events which shaped the facts at issue in this suit all called for his recusal or disqualification.[345]

The Eleventh Circuit disagreed with the first three contentions, but held that Judge Clemon's involvement both as a state senator and as a private attorney "in the disputed factual issues surrounding the composition of defendants' governing boards, the legislative efforts to improve A & M's physical

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[340] *Alabama*, 628 F. Supp. at 1140.

[341] United States v. Alabama, 828 F.2d 1532, 1536 (11th Cir. 1987), *cert. denied sub nom.*, Board of Trustees of Ala. State Univ. v. Auburn Univ., 487 U.S. 1210 (1988).

[342] *Alabama*, 828 F.2d at 1541.

[343] *Id.* at 1543.

[344] *Id.*

[345] *Id.* at 1544.

plant, and the State's treatment of black high school principals"[346] mandated his disqualification even at that late date in the litigation.[347]

In disqualifying Judge Clemon and remanding the case for a new trial, the court stated that it expressed no opinion as to the district judge's handling of the lawsuit,[348] but based its opinion on the importance of the issues at stake and an avoidance of even an appearance of impropriety.

> We consider the future of higher education in Alabama too important to be decided under a cloud. In a decision such as this one, a decision which will affect millions of Alabamians, public confidence in the judicial system demands a judge free from personal knowledge or biases about the issues before the court. For this reason, we disqualify Judge Clemon and remand for a new trial.[349]

2. *United States v. Alabama II*

After six district judges were recused on their own motion or by order of the Eleventh Circuit, Judge Harold L. Murphy, District Judge for the Northern District of Georgia, was designated to perform all judicial duties arising from the Alabama higher education case.[350] On remand, the Knight plaintiffs were designated lead plaintiffs, and both they and the United States filed amended complaints. The court then certified a class of "all black citizens of Alabama and all past, present and

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[346] *Id.* at 1546. Judge Clemon had been a counsel of record in Lee v. Macon County Bd. of Educ., 267 F. Supp. 458 (M.D. Ala. 1967), *aff'd sub nom.*, Wallace v. United States, 389 U.S. 215 (1967), a civil rights case challenging the operation by the State of Alabama of segregated by race junior colleges and trade schools. In denying the original recusal motion of Auburn University, Judge Clemon stated that he took no part in the portion of the case involving issues of higher education and that his involvement was limited to representation of black high school principals. *Id.* at 1545. The Eleventh Circuit found this limited involvement, however, to have "left Judge Clemon with knowledge of facts that were in dispute in the instant case." *Id.*

[347] *Alabama*, 828 F.2d at 1546.

[348] *Id.*

[349] *Id.*

[350] Knight v. Alabama, 787 F. Supp. 1030, 1050 (N.D. Ala. 1991).

future students, faculty, staff and administrators of Alabama State University and Alabama A & M University."[351]

Judge Murphy chose not to bifurcate the case into two proceedings between liability and remedy, as Judge Clemon had done, but chose to hear both issues during a single proceeding.[352] Trial began October 29, 1990, and continued to April 16, 1991. Approximately 200 witnesses gave testimony and hundreds of thousands of pages of exhibits were received, which resulted in a transcript in excess of 22,000 pages.[353]

Contentions of the parties were remarkably similar to those of the plaintiffs in the Louisiana and Mississippi higher education desegregation cases. The Knight plaintiffs contended that the State of Alabama's official policy of white supremacy in higher education had been implemented historically and continued on until the present time through the following practices: restricting the missions of Alabama State University (ASU) and Alabama Agricultural & Mechanical College (AAMU); failing to provide black Alabamians with the same liberal arts, graduate and professional educational opportunities as were provided whites; denying AAMU both state and federal land grant funding; maintaining white control over the public education of blacks; limiting access of blacks to undergraduate, graduate and professional programs; excluding blacks from governing boards, faculty positions, and administrative staffs of historically white universities (HWUs); and creating and expanding branch centers of HWUs in close proximity to those of historically black universities (HBUs), thereby restricting the missions of HBUs and ensuring that white students would not be forced to submit to the educational authority of black persons.[354]

The basic contention of the United States was that the vestiges of racial segregation had not been eliminated "root and branch" from public higher education in the State of Alabama and that the court should direct formulation of a plan designed

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[351] *Knight*, 787 F. Supp. at 1051.

[352] *Id.*

[353] *Id.*

[354] *Id.* at 1051-53.

to eliminate such vestiges. Specifically, the United States contended that the defendants had failed to take the necessary steps of converting "white schools" and "black schools" to "just schools" by: placing program offerings at geographically proximate institutions, which hindered the ability of black schools to attract white students; failing to hire qualified black faculty and administrators at white schools; permitting white schools to adopt admission policies which resulted in fewer black students enrolling in those schools; failing to make black schools attractive to white students through the providing of sufficient funding; failing to eliminate program duplication; and operating two agricultural schools — one black and one white.[355]

Unlike the defendants in the Louisiana and Mississippi cases, the various *Knight* defendants raised separate defenses and were represented by numerous different attorneys. The basic contentions of the defendants, presented here in a consolidated and summarized form, were these: race-neutral admission and employment practices are all that are required by the Constitution or Title VI of the Civil Rights Act of 1964; the fact that the HBUs remain almost entirely black is the result of free choice; racial imbalance alone does not violate the Constitution;[356] and the standard for determining whether an institution has dismantled a racially dual school system differs at the higher education level from the elementary-secondary level.[357]

Maintaining that the court could not determine whether vestiges of historical racial discrimination persisted in Alabama's system of public higher education without a clear exposition of what policies of discrimination had existed in the past, how they had been intended to disadvantage black people, and what effects they actually had,[358] Judge Murphy traced through ninety-two pages of his opinion the historical development of higher education in the State of Alabama.[359] He re-

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[355] *Id.* at 1053-54.

[356] *Knight*, 787 F. Supp. at 1055-61.

[357] *Id.* at 1353-54.

[358] *Id.* at 1066.

[359] *Id.* at 1061-1153. Judge Murphy relied heavily on the testimony of three

counted attempts made by whites to first prevent and then control education of blacks; efforts of blacks to establish and operate public higher educational institutions for black students; the role of these institutions in the civil rights movement; institution of the land grant system; development of the branch campuses; and massive resistance by the State of Alabama after *Brown* to avoid desegregation.[360]

Judge Murphy next turned to a detailed assessment of the present racial composition of student bodies, faculty, and administrative staff on the respective campuses; funding, mission and programs of the different institutions; adequacy of campus facilities at the HBUs; and recruitment, admission and retention efforts made by HWUs toward black students.[361] In his findings of fact, Judge Murphy concluded that vestiges of segregation remained within the Alabama system of higher education in the following areas: faculty and administrative employment, state funding for higher education, facilities of the HBU's, admissions policies, and program duplication.[362]

Having made factual findings of lingering effects of intentional segregation, Judge Murphy turned to a legal analysis of the constitutional duty to desegregate higher education institutions in former *de jure* states and the nature of the remedial obligation necessary to conform a state's practices with that duty.[363] He defined the scope of the duty to be that set forth in *Swann* and *Green*: where a state has previously maintained a *de jure* system of education based upon race, it must take necessary steps to eliminate all vestiges of state-imposed segregation "root and branch."[364] He further found those principles to apply at the higher education level as well as elementary-secondary, stating: "A college student is no less entitled to attend

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historians called as expert witnesses: Dr. J. Mills Thornton, Professor of History at the University of Michigan; Dr. James D. Anderson, Professor of History at the University of Illinois; and Dr. William W. Rogers, Professor of History at Florida State University. *Id.* at 1065-66.

[360] *Id.* at 1061-1153.

[361] *Knight*, 787 F. Supp. at 1153-1348.

[362] *Id.* at 1368.

[363] *Id.* at 1354.

[364] *Id.* at 1356.

a non-racially segregated state institution than is a secondary school student."[365]

Rejecting the argument of defendants that the standard for determining if a state has dismantled a racially dual school system differs depending on whether the system involves primary, secondary, or higher education, the court said:

> In each of these contexts, the inquiry is the same: has the state and its institutions ceased intentionally discriminatory conduct and adopted race neutral practices, *and also*, have they eliminated to the extent possible the vestiges of the prior dual system of discrimination, root and branch.[366]

In applying this two-part test, the court specifically held that the State of Alabama and its institutions were required to do more than adopt race-neutral practices; they must eliminate, to the extent practical, "the vestiges of segregation which continue to have an impermissible impact on the exercise of student choice."[367]

The court then fashioned a remedial decree which imposed on the HWUs varying degrees of responsibility in achieving material improvement in the employment of black faculty and administrative staff; instructed Alabama State University to develop a plan for improving recruiting and enrollment of white students on its campus; directed that the funding formula and appropriations for capital improvement be changed so as to benefit the HBUs; required that duplication of certain programs be eliminated; and that a statewide Monitoring Committee be established to make annual reports to the court concerning all aspects of efforts being made to achieve a greater level of desegregation in the higher education system of Alabama. The court retained jurisdiction of this action for an initial period of ten years and reserved the right to direct the transfer of funds between any parties to the case in order to effectuate the decree.[368]

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[365] *Id.* at 1357.

[366] *Knight*, 787 F. Supp. at 1358.

[367] *Id.* at 1360.

[368] *Id.* at 1377-82.

VII. The Final Choice Reaches the Supreme Court

Faced with a Petition for Certiorari arising from the Fifth Circuit and a high likelihood that another from the Eleventh Circuit would arrive as soon as the current Alabama higher education desegregation litigation completed its cycle below, the Supreme Court had some difficult choices to make: Should certiorari be granted in *Ayers* and, if so, what standard should be applied in determining whether public colleges and universities in former *de jure* states had fulfilled their constitutional obligations concerning desegregation.

A. The Matter of Certiorari

The en banc decision of the Fifth Circuit Court of Appeals in *Ayers v. Allain*[369] had raised an important issue affecting public higher education institutions in seventeen states which formerly maintained *de jure* segregated colleges and universities. The decision had immediate impact on the operation of eight public universities in Mississippi and seventeen in Louisiana, and established a binding legal standard on the State of Texas, also in the Fifth Circuit. In addition, the question of the correct remedial standard was pivotal in the then pending Alabama higher education desegregation case.

The question of the appropriate standard to be used in defining the scope of desegregation efforts required of a public higher education institution in a former *de jure* state had not been settled by the Supreme Court as the cases throughout this paper demonstrate.[370] Controversy existed among the district

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[369] *See supra* notes 267-314 and accompanying text.

[370] The panel majority in *Ayers II* began its legal discussion: "The scope of a state's duty to eliminate the effects of former *de jure* segregation in its public universities remains in question." 893 F.2d 732, 743 (5th Cir. 1990). The en banc majority was equally forthright: "The precise constitutional obligation of a state with respect to its system of higher education . . . is not so clearly defined as in cases involving primary and secondary education." *Ayers III*, 914 F.2d 676, 682 (5th Cir. 1990). The district court judge in *Ayers I* said: "There is . . . substantial disagreement on the question of whether the scope of the duty is as broad in the higher education context as has been defined and applied in the elementary and secondary education context." *Ayers I*, 674 F. Supp. 1523 (N.D.Miss. 1987).

courts, circuit courts, and commentators over whether *Green* was applicable to higher education or whether *Bazemore* set the prevailing standard.

The decision on appeal, *Ayers III*, was in conflict with decisions of the Sixth Circuit in *Geier v. University of Tennessee* and *Geier v. Alexander*,[371] where that court found the mandates of *Green* to be applicable to colleges and universities and declined to find that *Bazemore* had any bearing on education. The Sixth Circuit found the duty at the higher education level as exacting as in elementary/secondary school systems, which is to remove all vestiges of segregation imposed by the state.[372]

In stark contrast, the Fifth Circuit found *Bazemore* to be controlling and said: "[W]e disagree with both the holding and reasoning in *Geier*." "[W]e . . . hold that to fulfill its affirmative duty to disestablish its prior system of *de jure* segregation in higher education, the State of Mississippi satisfies its constitutional obligation by discontinuing prior discriminatory practices and adopting and implementing good-faith, race-neutral policies and procedures."[373]

It would have been difficult to have found a more dramatic conflict between two circuits on a major issue of constitutional law or to have found an important legal question over which more confusion existed. The Court was correct in granting certiorari.

The Court of Appeals for the Sixth Circuit in *Geier v. University of Tenn.*, 597 F.2d 1056, 1066 (6th Cir. 1979), in its discussion of the duty of a state to remove vestiges of *de jure* segregation, wrote: "The Supreme Court has never dealt with the precise issues in this case."

See also Baxter, *supra* note 172, at 2 (Since the pre-*Brown* graduate school cases, "the Supreme Court has not provided any substantive standards to ascertain the nature or scope of constitutional violations in higher education systems, nor has it defined the extent of the affirmative duty of such systems to eradicate the indicia of their formerly segregated status."); Miller, *supra* note 49, at 556 (Since *Hawkins* in 1956, the Court has not issued a single opinion which addresses the application of *Brown* to higher education."); Comment, *supra* note 231, at 899 (Uncertainty still remains "as to the affirmative duty to integrate on the level of higher education.").

[371] *See supra* notes 259-66 and accompanying text.

[372] Geier v. Alexander, 801 F.2d 799, 805 (6th Cir. 1986).

[373] *Ayers III*, 914 F.2d at 686.

B. Closing Arguments

Strong arguments and implementation considerations relative to both the *Green* and *Bazemore* positions had been developed prior to the granting of certiorari in *Ayers*. A brief summary of these follow.[374]

1. Green

Powerful legal, ethical and moral arguments had been made for declaring *Green* to be the appropriate standard defining the scope of the duty of public colleges and universities in former *de jure* states to desegregate. *Green* was rooted in *Brown* and *Brown* in the Fourteenth Amendment concept of equal protection within the field of education.

The Supreme Court did not exclude higher education from *Brown*'s reach, but rather immediately extended *Brown*'s principles to that arena by ordering the University of Florida,[375] Louisiana State University,[376] and Wichita Falls Junior College[377] to admit black students to their undergraduate as well as graduate programs. Likewise, none of *Brown*'s progeny had ever excluded higher education, but had spoken, as did *Brown*, only in terms of "public education."[378]

The concept of stigmatization explicit in *Brown* did not have a cut-off point at grade twelve. If "separate is inherently unequal" and years of state-imposed segregation stigmatize and damage the hearts and minds of students "in a way likely never to be undone,"[379] then that inherent inequality and stigma

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[374] The respective positions of the private plaintiffs, United States and defendants are presented in detail in a subsequent article in this issue.

[375] State *ex rel.* Hawkins v. Board of Control, 347 U.S. 971 (1954).

[376] Tureaud v. Board of Supervisors of La. State Univ., 347 U.S. 971 (1954).

[377] Wichita Falls Junior Coll. Dist. v. Battle, 347 U.S. 974 (1954).

[378] *See Green*, 391 U.S. at 436 ("The transition to a unitary , nonracial system of public education was and is the ultimate end to be brought about."); *Brown I*, 347 U.S. at 495 ("[I]n the field of public education . . . 'separate but equal' has no place."); *see also* Note, *The Affirmative Duty to Integrate in Higher Education*, 79 YALE L.J. 674 (1970).

[379] *Brown I*, 347 U.S. at 494.

exist at all levels of public education—kindergarten through graduate/professional. The "hearts and minds" of George McLaurin, Autherine Lucy and James Meredith were just as surely and deeply hurt as were those of Linda Brown and Harry Briggs, Jr.

Brown and *Green* addressed a constitutional wrong, one which had to be corrected not merely by discontinuing the wrongful conduct, but by reaching out affirmatively to remove all outward and visible signs of the segregation so passionately enforced for many years by the state. As Judge Wisdom described the duty in *Jefferson County*, what the state has done, it must undo.[380] That duty should not be diminished simply because the activity in question is neither compulsory nor free.

The practical difficulties of implementing the *Green* standard at the higher education level are not beyond reason or reach;[381] they extend only to that which is "possible,"[382] and "to the extent practicable."[383] All parties to the desegregation suits pending at the time *Ayers* reached the Supreme Court, as well as courts and commentators addressing this issue, had recognized that the means of eliminating vestiges of discrimination in colleges and universities necessarily differ from those at the elementary/secondary level. These differences, however, do not relieve the state of its constitutional duties.[384] While

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[380] United States v. Jefferson Co. Bd. of Educ., 372 F.2d 836, 868 (5th Cir. 1966), *aff'd on rehearing en banc with modifications*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967).

[381] Contrary to what many understand or believe, the part of this country where school desegregation is working best is in the Deep South; *see* James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1465 (1990) ("School desegregation is not dead. It lives quietly in what used to be the Confederate South."); J. HOCHSCHILD, THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION 179-83 (1984) (Strongest support for school desegregation by whites occurs among southerners whose children are or have been involved in mandatory desegregation plans.); WILLIS D. HAWLEY ET AL., STRATEGIES FOR EFFECTIVE DESEGREGATION: LESSONS FROM RESEARCH 4 (1983) ("The greatest progress in desegregation has been in the South where changes have been dramatic and lasting.").

[382] *See* Milliken v. Bradley, 433 U.S. 267, 280 (1977).

[383] *See* Board of Education of Oklahoma City v. Dowell, 498 U.S. 237 (1991).

[384] *See* Miller, *supra* note 49, at 583. ("The complexity of the remedies at the higher education level does not justify vitiating the constitutional rights of stu-

remedies such as busing, attendance zones, student assignment and pairing of schools are not available at the higher education level, others had been suggested. Among these were:

1. Enhancement of historically black institutions to attract white students;[385]

2. Affirmative action efforts in faculty/staff hiring and student admission to overcome discrimination of the past;[386]

3. Appointment of a Special Master to review employment and admission decisions, as well as placement of new programs;

4. Appointment of minority members to governing boards in proportion to population of minority group in the state;

5. Elimination of program duplication for non-essential courses;

6. Aggressive other-race recruitment and utilization of tuition waivers and scholarships to encourage white/black student cross-over;

7. Faculty development leaves to enable other-race faculty to obtain or complete terminal degrees;

8. Merger of institutions.[387]

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dents or supporting a radical departure from the constitutional obligation imposed by the Supreme Court in the primary and secondary school cases . . . .").

[385] As long ago as 1950, the Court took note of the general impact of superior resources on choice. Sweatt v. Painter, 339 U.S. 629 (1950). The Fifth Circuit also acknowledged the importance of physical facility attractiveness. Plaquemines Parish School Bd. v. United States, 415 F.2d 817, 831 n.24 (5th Cir. 1969) ("Free choice of schools can have no meaning where the choice is between schools which maintain athletic facilities and attractive grounds and schools which have no athletic facilities and grounds that are in a state of disrepair.").

[386] Affirmative action programs narrowly tailored to meet a compelling governmental interest in eradicating vestiges of previous unlawful segregation should pass scrutiny since designed to remedy past discrimination. However, after City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), heightened scrutiny will be applied to any such plan to determine if the remedial action was necessary and was narrowly tailored to remedy identified past discrimination. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1521-1544 (2d ed. 1988).

[387] Merger had been ordered as a remedy at the higher education level, but not without significant controversy and questionable results. Merger of the University of Tennessee-Nashville and Tennessee State University was ordered as being the only reasonable alternative remaining to eradicate the dual system of higher education in Tennessee. Geier v. University of Tennessee, 597 F.2d 1056 (6th Cir. 1979), *cert. denied*, 444 U.S. 886 (1979).

Should *Green* be the governing standard for the desegregation of public colleges and universities, its mandate to achieve not "black schools" or "white schools" but "just schools" would have significant impact upon the ability of the historically black institutions to retain their racial identity.[388] While strong educational policy arguments can be made for the enhancement and continuation of black colleges and universities,[389] these arguments cannot find solace in the Constitution.

A Louisiana federal district court ordered the merger of L.S.U. and Southern University law schools in 1989. As a result of the Fifth Circuit decision in Ayers v. Allain, 914 F.2d 676 (5th Cir. 1990), this order was vacated before the merger was implemented. United States v. Louisiana, 751 F. Supp. 606, 608 (E.D. La. 1990). *See generally* Darrell K. Hickman, Note, *Realizing the Dream: United States v. Louisiana*, 50 LA. L. REV. 583 (1990).

[388] It is significant to note that the continued racial identifiability of Tennessee State University (99% black) years after racially restrictive admissions policies had been discontinued led to the ultimate merger order in Geier v. University of Tennessee, 597 F.2d 1056 (1979).

[389] One of the primary concerns in a discussion of remedial action to be taken if *Green* were adopted as the standard was the effect it would have upon the historically black public colleges and universities, especially in the Deep South. There are 104 such institutions today, 57 private and 47 public. Most are small, enrolling from 1000-3000 students, eighty-four percent of whom are black. Garibaldi, Exemplary Programs at Historically Black Colleges 2 (July 24-26 (1990) (unpublished manuscript presented at Conference on The Future of African-American State Universities, Birmingham, Ala.).

The debate over the continuing role of these historically black institutions is of long-standing and dates back to the 1930s when competing positions were articulated in a controversy between W.E.B. DuBois, expressing what has been called the "race-pride" position, and leaders of the NAACP, most notably Dean Charles Thompson, expressing the "integrationist" position. Mark Tushnet, Desegregation and African-American State Universities: The Constitutional Dimensions 2 (July 24-26, 1990) (unpublished manuscript presented at Conference on The Future of American-American State Universities, Birmingham, Ala.). In more recent years, Professor Derrick Bell and the Reverend Jesse Jackson have taken leadership roles in presenting the case for maintaining the racial identity and distinctiveness of black colleges and universities, while Roy Wilkins has supported merger of historically black and white institutions as a means of achieving further desegregation. *See* Derrick A. Bell, Jr., *Black Colleges and the Desegregation Dilemma*, 28 EMORY L.J. 949 (1979); *but see* Kenneth B. Clark, *Separate is Still Unequal*, NATION, July 7, 1979, at 7 ("Black colleges perpetuate inferior academic standards for black students and award Jim Crow degrees that do not meet the standards of the average traditionally white colleges."); *see* PREER, *supra* note 33, at 205. In 1973, Operation PUSH, led by the Rev. Jackson, sponsored Black Expo., with the theme, "Save the Black Colleges." Mr. Wilkins supported the plan calling for the merger of L.S.U. and Southern University, as well as historically

2. *Bazemore*

The arguments on behalf of *Bazemore* are much less complicated in theory and in practice. They rest on the concept of choice and the inherent differences between elementary/secondary and higher education. They do not diminish the equal education opportunity mandate of *Brown*, but simply find that the constitutional obligation is satisfied with good-faith implementation of nondiscriminatory policies and procedures.

The Supreme Court in *Bazemore* defined the standard applicable to the disestablishment of state-imposed segregation in a noncompulsory education program. In so doing, it specifically declined to impose the more stringent standard of *Green* to the facts of the case because of the noncompulsory attributes of the extension programs.

> While school children must go to school, there is no compulsion to join 4-H or Homemaker Clubs, and while School Boards customarily have the power to create school attendance areas and otherwise designate the school that particular students may attend, there is no statutory or regulatory authority to deny a young person the right to join any Club he or she wishes to join.[390]

The importance the Court placed on factors of student assignment, the compulsory nature of the activity, and the state's power to create or designate student attendance clearly indicates that the differences in elementary/secondary and higher education matter.

VIII. Conclusion

On June 26, 1992, the United States Supreme Court rendered its opinion in *United States v. Fordice*, finding by an eight-one vote that Mississippi continued to maintain a system

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black Grambling with historically white Louisiana Tech, in the state of Louisiana. He saw the issues in higher education with respect to one-race schools to be no different than those at the elementary/secondary level. *Id.*

[390] Bazemore v. Friday, 478 U.S. 385, 408 (1986).

of higher education carrying vestiges of past discrimination and holding as a matter of law that the state had an affirmative duty to remove the lingering vestiges. The case was remanded to the Fifth Circuit and then to Judge Neal Biggers, Federal District Court, Northern District, Mississippi, for remedial action.

Subsequent articles in this issue summarize the arguments made by the private plaintiffs, the defendant and the United States before the Supreme Court and analyze the Court's decision.

UNITED STATES V. FORDICE: A SUMMARY OF THE PARTIES' ARGUMENTS

I. INTRODUCTION

> [F]rom the moment the [State] discovered [James] Meredith was a Negro they engaged in a carefully calculated campaign of delay, harassment, and masterly inactivity. It was a defense designed to discourage and to defeat by evasive tactics which would have been a credit to Quintus Fabius Maximus.[1]

There is no question that Mississippi operated a dual, racially-discriminatory higher education system before 1962 when the United States Court of Appeals for the Fifth Circuit ordered the University of Mississippi to admit James Meredith.[2] Thirty years later, the issue presented in *United States v. Fordice*[3] was the scope of a state's duty to correct past discrimination. Does Mississippi continue to wage the "campaign of delay, harassment, and masterly inactivity" depicted by Judge Wisdom? Or has the State, as it contended, done all that our Constitution required?

The petitioner[4] argued that the Fourteenth Amendment and Title VI imposed upon the State a broad affirmative duty

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[1] Meredith v. Fair, 305 F.2d 343, 344 (5th Cir. 1962), *cert. denied*, 371 U.S. 828 (1962).

[2] *Id.* at 345.

[3] 112 S. Ct. 2727 (1992), *vacating and remanding* Ayers v. Allain, 914 F.2d 676 (5th Cir. 1990) (en banc).

[4] As discussed more fully elsewhere in this issue, this case resulted from a class action suit instituted in 1975 by a group of black citizens (petitioners) against the governor and the Board of Trustees of State Institutions of Higher Learning, among others.

to rid its higher education system[5] of all continuing intentional discrimination and any remaining "vestiges" or effects of past discrimination. Conversely, the State maintained that its only duty was to implement race-neutral policies which would ensure that each Mississippi citizen enjoyed a "freedom of choice" among schools. This summary attempts to present a fairly concise yet comprehensive overview of the arguments advanced by each of the parties to this lengthy action.[6]

A. Procedural History Of Ayers

In January 1975, a group of black citizens filed a class action suit[7] against Mississippi's governor, the Commissioner

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[5] Mississippi's public higher education system is comprised of eight institutions, characterized throughout this work as either a historically-white institution (HWI) or a historically-black institution (HBI):

HBIs	HWIs
Alcorn State University (ASU)	Delta State University (DSU)
Jackson State University (JSU)	Mississippi State University (MSU)
Mississippi Valley State University (MVSU)	Mississippi University for Women (MUW)
	University of Mississippi (UM)
	University of Southern Mississippi (USM)

An informative description of each institution is included in the text of the district court's decision. *See* Ayers v. Allain, 674 F. Supp. 1523, 1526-28 (N.D. Miss. 1987).

[6] This summary has been compiled, for the most part, from two unpublished manuscripts: Russell W. Mills, Racial Discrimination in Mississippi's Higher Education System: The *Ayers* Petitioner's View (1992); William J. Dunaway, *Ayers*: The Respondents' Position (1992).

The goal of this summary is to fairly and accurately present the arguments of the *Ayers* petitioners, the State of Mississippi and the United States as presented to the United States Supreme Court in United States v. Fordice, 112 S. Ct. 2727 (1992). The writers relied extensively on the briefs submitted to the Court by the parties. The Petitioner's Brief, Respondent's Brief, and U.S. Brief are all readily available on LEXIS in the BRIEFS file of the GENFED library. For clarity and uniformity, references to textual material of those briefs are, in most cases, cited to the closest footnote. In some instances, reference has also been made to passages from the Petitioner's oral argument [hereinafter *Petitioner's Oral Argument* or *Petitioner's Rebuttal Argument*].

[7] Ayers v. Allain, 674 F. Supp. 1523, 1526 (N.D. Miss 1987) [hereinafter

of Higher Education, the Board of Trustees of State Institutions, each of the five HWIs and the chief administrative officer of each HWI.[8] The class alleged that the State of Mississippi maintained "a racially dual system of public higher education in violation of the Fifth, Ninth, Thirteenth, and Fourteenth Amendments to the United States Constitution, 42 U.S.C. §§ 1981 and 1983, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*"[9] On April 21, 1975, the United States Attorney General filed a complaint-in-intervention, alleging that actions of the defendants maintained and perpetuated an unlawful dual system of higher education based on race in violation of the Fourteenth Amendment and Title VI.[10]

The case remained under the jurisdiction of the district court for the next twelve years while the parties sought to reach a resolution. After all attempts "failed to achieve a mutually satisfactory comprehensive agreement," the case was set for trial.[11] The bench trial began on April 27, 1987 and continued for five weeks, during which time the court heard testimony from 71 witnesses and received 56,700 pages of exhibits. The court ultimately ruled for the State on the issue of liability and dismissed the suit holding that the "current actions on the part of the [State] demonstrate conclusively that the [State is] fulfilling [its] affirmative duty to disestablish the former de

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Ayers I], *aff'd*, 914 F.2d 676 (5th Cir. 1990). The plaintiff class was certified and defined by Judge William C. Keady (then Chief Judge of the United States District Court for the Northern District of Mississippi and acting in his capacity as managing judge of the three-judge court) on September 17, 1975 as:

> All black citizens residing in Mississippi, whether students, former students, parents, employees, or taxpayers, who have been, are, or will be discriminated against on account of race in receiving equal educational opportunity and/or equal employment opportunity in the universities operated by said Board of Trustees.

Ayers I, 674 F. Supp. at 1526.

[8] Respondent's Brief at n.1, United States v. Fordice, 112 S. Ct. 2727 (1992) (Nos. 90-1205, 90-6588) [hereinafter *Respondent's Brief*]. Unless the context otherwise requires, references in this summary to "the State" includes all respondents. References to "the Board" address the Board of Trustees of State Institutions of Higher Learning. *Id.*

[9] *Ayers I*, 674 F. Supp. at 1524.

[10] *Id.*

[11] *Id.* at 1526.

jure segregated system of higher education."[12] The plaintiffs perfected a timely appeal.

A divided three judge panel of the United States Court of Appeals for the Fifth Circuit reversed and remanded the case for remedial proceedings.[13] However, the Fifth Circuit granted a suggestion for rehearing en banc[14] and on rehearing, the en banc court vacated the panel decision and affirmed the district court.[15] The court of appeals plainly stated at the outset of its opinion the ultimate basis for its affirmance: "finding that the record makes clear that Mississippi has adopted and implemented race neutral policies for operating its colleges and universities and that all students have real freedom of choice to attend the college or university they wish, we affirm."[16]

The United States Supreme Court granted certiorari[17] and on June 26, 1992 issued its opinion vacating *Ayers III* and remanding the case to the district court.[18]

II. PETITIONER'S ARGUMENT

A. Bazemore Is Not Controlling

Throughout the long history of the *Ayers* litigation, the petitioner consistently argued for adoption of the broad affirmative duty imposed by *Brown v. Board of Education*[19] and *Green v. County School Board*,[20] while rejecting the less-stringent standards adopted by the Court in *Bazemore v. Friday*.[21] *Green* had been adopted as the appropriate standard by the Sixth Circuit[22] while *Bazemore* had been adopted as controlling by

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[12] *Respondent's Brief*, *supra* note 8, at n.23 and accompanying text (quoting *Ayers I*, 674 F. Supp. at 1554).

[13] Ayers v. Allain, 893 F.2d 732, 756 (5th Cir. 1990) [hereinafter *Ayers II*].

[14] Ayers v. Allain, 898 F.2d 1014 (5th Cir. 1990).

[15] Ayers v. Allain, 914 F.2d 676, 678 (5th Cir. 1990) (en banc) [hereinafter *Ayers III*].

[16] *Respondent's Brief*, *supra* note 8, at n.25 and accompanying text (quoting *Ayers III*, 914 F.2d at 678).

[17] United States v. Mabus, 111 S. Ct. 1579 (1991).

[18] United States v. Fordice, 112 S. Ct. 2727 (1992).

[19] 349 U.S. 294 (1955).

[20] 391 U.S. 430 (1968).

[21] 478 U.S. 385 (1986) (per curiam).

[22] Geier v. University of Tenn., 597 F.2d 1056 (6th Cir.), *cert. denied*, 444

the Fifth Circuit.[23]

Attempting to distinguish *Bazemore* from *Ayers* factually, the petitioner focused on the different degree of discrimination present in the two cases.[24] Indeed, the only discrimination present in *Bazemore* was the club's continued segregated membership.[25] The club's membership criteria, staffing patterns and club services had ceased to be discriminatory whereas the *Ayers* petitioner contests virtually the entire structure of the Mississippi higher educational system.[26] Rather than a "lingering" vestige, Mississippi's higher education system represents a "series" of vestiges of sufficient weight to prevent an individual's "voluntary and unfettered choice" of institutions.[27]

The petitioner also argued that, given the difference in the degrees of discrimination present, the limited range of possible

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U.S. 886 (1979). In *Green*, the Supreme Court concluded that Virginia's "freedom-of-choice" plan, as applied to public elementary and secondary schools, failed to meet the requirement of *Brown* that dual educational systems be abolished. *Green*, 391 U.S. at 441. According to the Court, the Fourteenth Amendment of the Constitution required the State "to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.* at 437-38.

[23] *Ayers III*, 914 F.2d at 686. In *Bazemore*, the Supreme Court employed a less stringent standard by which a state could prove itself free of past discrimination when it concluded that a state agency had satisfied its constitutional obligations by simply discontinuing prior discriminatory practices and adopting and implementing good faith, race-neutral policies. *Bazemore*, 478 U.S. at 408 (White, J., concurring). Despite the petitioner's arguments, the lower courts throughout the *Ayers* litigation chose not to extend the *Green* elementary-secondary education standard to the higher education setting of *Ayers*. The Fifth Circuit Court of Appeals observed that *Green* involved "involuntary" elementary school attendance and had focused on remedial measures appropriate for involuntary activities. *Ayers III*, 914 F.2d at 686. Analogizing *Bazemore*'s "voluntary" clubs to Mississippi's "voluntary" universities, the courts below held that the *Green* standard was inapplicable to *Ayers*. *Id.* at 686. In the end, the Fifth Circuit concluded that the state's duty to remedy *de jure* segregation was satisfied "by discontinuing prior discriminatory practices and adopting and implementing good-faith, race-neutral policies and procedures." *Id.* at 687.

[24] Petitioner's Brief at text accompanying n.135, United States v. Fordice, 112 S. Ct. 2727 (1992) (No. 90-6588) [hereinafter *Petitioner's Brief*].

[25] *Bazemore*, 478 U.S. at 407 (White, J., concurring).

[26] *Petitioner's Brief*, *supra* note 24, at text accompanying n.135.

[27] *Id.* (citing *Bazemore*, 478 U.S. at 407 (White, J., concurring)). This "series" of vestiges is discussed later in this work at the text accompanying notes 62-110.

remedies available in *Bazemore* distinguished it from *Ayers*.[28] In *Bazemore*, the agency needed only to cease active discrimination, adopt neutral criteria and implement certain other minor affirmative steps.[29] In Mississippi, however, petitioner contended that multiple vestiges of discrimination exist and are pervasive throughout the state's entire higher educational system. In response to such extensive discrimination, the petitioner advanced numerous possible remedies, claiming each warrants close examination under a more stringent standard such as that of *Green*.[30] A situation where only one discriminatory effect exists, for which there is no practicable remedy (*Bazemore*), simply cannot be compared to a situation where multiple effects exist for which there are multiple potential remedies (*Ayers*).

Lastly, the petitioner contended that *Bazemore* was misapplied as it involved only the membership of a voluntary social association whereas *Ayers* involves the administration of one of government's most important functions.[31] Indeed, the governing board in *Bazemore* possessed only the authority to deny an applicant access to that particular club. In contrast, the Mississippi Board of Trustees of State Institutions of Higher Learning (Board) possesses the authority to *deny any Mississippi citizen entry to any Mississippi institution of higher learning*. The petitioner contended that special scrutiny should be accorded a system of such vital importance to the development of its citizens particularly where that system is susceptible to unbridled local plenary control.

B. Green is Controlling

The crux of the *Ayers* petitioner's argument was the application of the *Green* standard. Petitioner consistently advanced two independent, alternative justifications to support that application.

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[28] *Petitioner's Brief, supra* note 24, at text accompanying n.135.
[29] *Bazemore*, 478 U.S. at 407 (White, J., concurring).
[30] *Petitioner's Brief, supra* note 24, at text accompanying nn.126-28.
[31] *Id.* at text accompanying n.135.

1. Title VI Justification

One basis for this application is found in statutory language and supported by implementing regulations.[32] Section 601 of Title VI of the Civil Rights Act of 1964 provides that "[n]o person . . . shall, on the ground of race . . . be subjected to discrimination under any program . . . receiving federal financial assistance . . . ."[33] Where discrimination is found under Title VI, the implementing regulations explicitly require not merely "discontinuing prior discriminatory practices and adopting and implementing good-faith, race-neutral policies and procedures" but instead mandates "*affirmative action to overcome the effects of prior discrimination*".[34]

In sum, Title VI provides an independent statutory basis which clearly and concisely applies the *Green* standard to higher education. This is precisely the application the petitioner advanced and the courts below continued to reject. Contrary to these courts' conclusions, petitioner contended that Title VI itself clearly rejects the State's proposal that "race neutral" practices satisfy the state's obligations.

2. Constitutional Justification

The petitioner also argued that the use of the *Green* standard is permissible under the Fourteenth Amendment of the Constitution.[35] It should be observed that the Constitution

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[32] *Id.* at text accompanying n.102.

[33] 42 U.S.C. § 2000(d) (1981).

[34] *Petitioner's Brief*, *supra* note 24, at text accompanying n.100 (quoting 34 C.F.R. § 100.3(b)(6)(i) (emphasis added)). Further, relevant administrative regulations explain that the goal of Title VI is "participation by persons of a particular race." *Id.* (quoting 34 C.F.R. § 100.3(b)(6)(ii)) and require steps that "ensure that groups previously subjected to discrimination [be] adequately served." *Id.* (quoting 34 C.F.R. § 100.5(h)). A 1978 administrative regulation required states to take affirmative steps such as encouraging white students to attend black institutions. *Id.* at n. 100 (citing *Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education*, 43 Fed. Reg. 6,658 (Feb. 15, 1978)). In addition, a 1973 report from the Department of Health, Education and Welfare's Office of Civil Rights concluded that the state had "shown inadequate progress in disestablishment" and listed student enrollment and faculty allocation as decisive factors. *Id.* at n.101.

[35] *Petitioner's Brief*, *supra* note 24, at n.88-90 and accompanying text.

itself doesn't make these courts' distinctions between elementary and secondary education and higher education. It is clear, too, that the underlying "clear and central purpose" of the Fourteenth Amendment was to remove racial discrimination in whatever form.[36] Indeed, the Court has a long history of employing the Fourteenth Amendment to impose a duty on state officials to eliminate discrimination from their educational systems.[37]

More specifically, the Court's past secondary-elementary decisions identify their goal as the removal of the vestiges of discrimination from the educational setting.[38] In each of these decisions, the Court did not hesitate to use the Fourteenth Amendment to exert control over local governing bodies who have manipulated the educational system to the detriment of its black citizens.[39]

Similar to those instances, vestiges of racial discrimination are now well-entrenched in Mississippi's educational system. This discrimination directly disadvantages the state's black citizens by depriving them of access to higher education.[40] Per-

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Throughout, the petitioner has insisted that the Title VI claim be heard before the constitutional claim. *Petitioner's Brief*, *supra* note 24, at text accompanying n.99 (citing New York City Transit Auth. v. Beazer, 440 U.S. 568, 582-83 (1979)). At oral argument, petitioner's counsel observed that the standards used in the Title VI regulations were more specific and provided instruction in applying the constitutional standards. *Petitioner's Oral Argument*, *supra* note 6. While the "means may be a little different," the "results [of Title VI and the 14th Amendment] are the same . . . ." *Id.*

[36] *Id.* at text accompanying nn.88-91 (quoting Loving v. Virginia, 388 U.S. 1, 10 (1967)).

[37] *Id.* at text accompanying n.89 (citing Board of Education v. Dowell, 111 S. Ct. 630, 638 (1991) (noting state's duty is to eliminate discrimination "as far as practicable"); Louisiana v. United States, 380 U.S. 145, 154 (1965) ("so far as possible").

[38] *Id.* at text accompanying nn.88-91 (citing Milliken v. Bradley, 433 U.S. 267, 289-90 (1977); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 (1971)).

[39] *Id.* at text accompanying nn.88-91.

[40] *Petitioner's Brief*, *supra* note 24, at n.88. The petitioner cites a number of cases in which the Court observed that racially-discriminatory practices would result in potential harm to blacks. *Id.* (citing Carter v. Jury Comm'n, 396 U.S. 320, 339-40, n.46 (1970) (noting that discriminatory school segregation would harm blacks); Green v. County School Bd., 391 U.S. at 438 (1968) (discriminatory educational system); Louisiana v. United States, 380 U.S. at 154-55 (1965) (dis-

haps the greater harm is that it "shape[s] the 'landscape'"[41] with discrimination and results in the general impression that blacks are second-class citizens unworthy of equal protection. To avoid these harms, the petitioner urged the Court to again employ the Fourteenth Amendment to take control over the state's higher educational system and rid it of harmful discrimination. Toward this end, the petitioner proposed a method of analysis to aid the Court in reaching this result.

C. *Petitioner's Proposed Analysis*

The *Ayers* petitioner proposed the use of a four-step analysis, based on the Court's past precedent, to identify and remedy past and present discrimination in Mississippi's higher educational system.[42] Briefly, the Court must:

1. Identify continuing intentional discrimination.
2. Identify elements of the current system which were *originally organized* on a discriminatory basis.
3. Describe the "current configuration" of the elements that were originally discriminatory.
4. Where discriminatory "effects" or "vestiges" are found in the system or its elements, determine whether any remedy will provide more effective relief.[43]

The petitioner contended that this analysis would adequately reveal the existence and breadth of both intentional continuing discrimination and remaining *de jure* discrimination in Mississippi's higher education system.

1. *Identification of Continuing Intentional Discrimination*

The petitioner's first step involves the identification of all current practices that are intended to discriminate against blacks in the Mississippi higher education system.[44] The peti-

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criminatory voter-qualification tests); Guinn v. United States, 238 U.S. 347 (1915) (discriminatory voter registration)).

[41] *Id.* at text accompanying n.88 (citing *Brown*, 347 U.S. at 494 (noting that continuation of racially discriminatory system connotes blacks' lesser status)).

[42] *Id.* at text accompanying n.91.

[43] *Id.* at text accompanying nn.91-95.

[44] *Id.* at text accompanying n.91. As an example of this type of overt practice,

tioner contends that continued intentional discrimination, an identifiable harm itself, also perpetuates remaining vestiges of discrimination in Mississippi's higher education system.

2. *Identification of All Elements in the Current System Which Were Originally Organized With Discriminatory Intent*

This step of the petitioner's analysis requires the Court to examine the foundation of *every element* of Mississippi's current higher educational system in search of discrimination. The Court's examination of the Mississippi higher education system *must be broad and far-reaching.*[45]

3. *Describing the Current Configuration In Search of Vestiges of Discrimination*

This step of the petitioner's analysis requires the Court to recognize the possibility that "vestiges" or effects of past discrimination remain in the Mississippi system despite the state's alleged current use of racially-neutral policies.[46] A complete and accurate description of the present configuration of the system will illuminate those remaining vestiges. Once identified, they can be presumed to be the result of the originally-discriminatory practices which were previously-identified.

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the petitioner observed that Louisiana's clearly discriminatory voter-qualification test continued until the 1965 decision that rendered it unconstitutional. *Id.* (citing *Louisiana*, 380 U.S. at 145).

[45] In Board of Education v. Dowell, 111 S. Ct. 630 (1991), the Court emphasized the need to examine "every facet" of a system in determining whether all vestiges of *de jure* segregation had been eliminated. *Id.* at 638. While the *Dowell* plaintiffs complained only of discriminatory school assignments, the Court ordered a review of "faculty, staff, transportation, extracurricular activities and facilities." *Id.* (citing *Green*, 391 U.S. at 435). A later case recognized these elements as "among the most important indicia [of discrimination]." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1971)

[46] In Keyes v. School District No. 1, 413 U.S. 189 (1973), the Court recognized that some schools retained a "segregated character" years after desegregation. *Keyes*, 413 U.S. at 206. Where such a configuration continues, "the Court must presume a relationship between 'current [conditions]' [in discriminatory areas] and the 'prior intentionally [discriminatory] official acts . . . .'" *Petitioner's Brief*, *supra* note 24, at text accompanying n. 91 (citing Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 537 (1979).

4. *Determining the Appropriate Relief*

Where continuing intentional discrimination or vestiges of past discrimination are found in the previous steps, the Court need "only consider whether it is conceivable that a remedial process may yield more effective relief."[47] If effective relief is feasible, the state will have a "heavy burden to explain its preference for an apparently less-effective method."[48]

This last step of the petitioner's analysis illustrates the importance of remedies to the Court's ultimate assessment of the Mississippi system. Once any type of discrimination is found here, the petitioner need only suggest alternatives which are "feasible and more promising in their effectiveness"[49] for the state to fail its constitutional burden.

D. Application of the Petitioner's Proposed Analysis to the Facts

1. *Intentional Discrimination Through Continued Use of American College Test (ACT) Scores*

The petitioner argued that the Board's continued use of ACT scores alone as the sole factor in a school's admission decision constitutes intentional discrimination. In 1961, in response to James Meredith's attempts to enter the University of Mississippi (UM), the Board voted to require all college applicants to take the ACT.[50]

In 1976, the Board established an absolute minimum composite score of 9 for all institutions but allowed the HBIs to

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[47] *Petitioner's Brief*, *supra* note 24, at text accompanying n.95.

[48] *Green*, 391 U.S. at 439.

[49] *Id.*

[50] *Petitioner's Brief*, *supra* note 24, at n.26. The minimum score allowed for admission to MSU, UM and USM [HWIs] in 1963 was 15. *Id.* At that time, the average ACT score for white Mississippi high school students was 18 while the average for black students was 7. *Id.* As the petitioner notes, "few black persons could satisfy [admission to these four schools]." *Id.* at text accompanying n.26. Ultimately, the *Ayers* district court found that the Board's 1961 adoption of these minimum ACT requirements was the result of intentional discrimination. Ayers v. Allain, 674 F. Supp. 1523, 1555 (N.D. Miss. 1987).

establish their own upper minimum requirement and allowed the HWIs to continue their higher minimum requirement.[51] The HBIs thereafter set their minimum limit at 13 while the HWIs continued to apply 15 as their minimum.[52]

The 1976 revisions also authorized each school to admit "high risk" students whose score fell below that school's minimum, provided however that their score was 9.[53] Known as "exceptions", the petitioner observed that they have been used more widely at the HBIs[54] with the effect of attracting even more black students to the HBIs.[55] Moreover, some HWIs had not used *any* of their exceptions[56] and those few who did failed to publicize their availability.[57]

Not only were the HBI and HWI minimum scores widely different, but the Board has required that the ACT composite score[58] be the *sole factor* in each school's admission decision. The petitioner argued that this statistic alone is an unreliable indicator of the likelihood of a student's success in school. Furthermore, this use, in itself, operates to maintain a racially separate and unequal system.[59]

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[51] *Petitioner's Brief*, *supra* note 24, at text accompanying n.35.

[52] *Id.*

[53] *Id.*

[54] *Id.* at n.36. ASU, with an enrollment of approximately 3500, admitted from 114 to 165 more "exceptions" than any one of the much-larger HWIs. *Id.* at text accompanying n.35.

[55] *Id.*

[56] *Petitioner's Brief*, *supra* note 24, at text accompanying n.38. MUW [HWI] used *no* exceptions over one 4-year period. *Id.* The president of USM [HWI] went so far as to state that "we do not encourage students with less than 15 [to attend USM]". *Id.* at n.38.

[57] *Id.* at n.38.

[58] *Id.* at text accompanying n.29. The "composite" score consists of a numerical value ranging from 1 to 36 which represents the average scores obtained in tests in English usage, mathematics, social studies reading and natural science reading. *Id.* at n.27. The student also reports his own high school grades to ACT who forwards them to the school along with the composite score. *Id.*

[59] *Id.* at text accompanying nn.30-42. ACT itself recommends a combination of the ACT composite test score and high school grades. *Id.* at n.29. Noting this combination is "a better predictor of college grades than either [statistic] alone", ACT concludes that "it would be foolish to abandon [use of information on grades] . . . ." *Id.* Further, ACT has expressed this reservation particularly in regard to minority students. *Id.* at n.32. Indeed, very few out-of-state institutions use the Board's method. *Id.* at n.31. In one study, the Board found that, of 15

In sum, the Board's use of the ACT involves several means to reach the same end: higher HWI admission standards serve to keep lower scoring black students out of the HBIs; lower HBI admission standards cause an accumulation of blacks at the HBIs; HWIs' failure to utilize exceptions keeps lower scoring black students out of the HWIs; HBIs' overuse of exceptions ensures that even-lower scoring black students attend HBIs; and the HWIs' refusal to consider black students' grades ensures that black students do not gain entrance to HWIs when admission decisions are based on their historically-lower ACT scores. Thus, the 1976 ACT requirements were a discriminatory "continuation" of the intentional discrimination found in the earlier 1961 requirements.[60]

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southern and border states, only Mississippi considered the composite score alone. *Id.*

With that unreliability in mind, consider how the composite scores relate to high school grades using the HWIs' minimum score as a reference. For example, in 1985-86, 72.2% of white high school graduates scored 15 or higher on the ACT while only 29.7% of black high school graduates scored a 15. *Id.* at text accompanying n.34. However, in that same year, 43.8% of white high school graduates maintained a grade point average of 3.00 or higher while 30.5% of black graduates scored a 3.00. *Id.* Thus, considering the minimum ACT requirement at HWIs, there were *2.4 times more* eligible white students than blacks. But on a standard based on high school grades, the number of eligible whites exceeded blacks by *only 1.4 times*. *Id.*

[60] Although the Court had held the "continuing" use of minimum ACT scores constituted unlawful discrimination, Hunter v. Underwood, 471 U.S. 222, 223 (1985), the Ayers petitioner encountered difficulty in proving a case of continuing discrimination in the lower courts. Specifically, the trial court had found the 1961 ACT requirements to be intentionally discriminatory but not the 1976 requirements or exceptions so there could therefore be no "continuation." *Ayers I*, 674 F. Supp. at 1556-57. The courts below concluded that the requirements and exceptions provided nondiscriminatory "substantial flexibility" to the admissions system. The petitioner disputed this view as so few of the HWIs utilized their allotted exceptions. *See supra* text accompanying notes 57-61.

Further, the courts held that there had been no continuation because two different bodies enacted each of the requirements. In the view of the courts below, the Board's first act regarding the ACT was the adoption of the 1976 requirements. Discrimination related to the 1976 requirements could therefore not be a "continuation". The petitioner conceded that the original ACT requirements were adopted by the schools themselves and not the Board but each school's decision was made under authority expressly delegated by the Board. *Petitioner's Brief*, *supra* note 24, at text accompanying n.103 (citing Monell v. Department of Social Servs., 436 U.S. 658, 694 (1978) (noting state's responsibility for any act

2. *Identification of the "Vestiges" of Earlier Discrimination in the Current System*

The petitioner contended that the pre-*Brown* separate and unequal system remains substantially intact in today's higher education system. The conclusion that *de jure* segregation continues to exist is drawn by reviewing "every facet" of the system. In particular, the petitioner identified eight broad areas in which these vestiges exist: college attendance rates; enrollment; administrative staffs; faculty employment; programs, missions and branches; financial resources; physical facilities; and harassment at UM.

a. Disparity in College Attendance Rates Among the Races

A disparity in college attendance rates among the HWIs and HBIs exists in the current educational system. For example, while 51% of the state's elementary-secondary school population is black, only 31% of the state's undergraduate population is black.[61] Blacks' attendance rates in the graduate and professional schools are even more abysmal.[62] Further, black participation in higher education has decreased in the years since 1977-78 while the enrollment of other races has increased.[63] The number of black undergraduates has decreased by 14% but the undergraduate enrollment of other races increased by 7%.[64] In graduate schools, black enrollment has decreased by 28% while the enrollment of other races increased by 10%.[65]

The petitioner concluded that the Board's intentionally

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which is represented to be official policy)). Further, the court's view was "arbitrary" as the original 1961 ACT requirements were made with the approval of the same Board as that adopting the 1976 requirements. *Id.* at text accompanying n.103.

[61] *Petitioner's Brief*, *supra* note 24, at charts accompanying n.15.

[62] *Id.* In the 1985-86 academic year, blacks comprised 21% of the population of graduate schools, 2% of veterinary medicine schools, and 5% each at medical, dental and law schools. *Id.*

[63] *Id.* at chart accompanying n.16.

[64] *Id.*

[65] *Id.*

discriminatory use of the ACT requirements was primarily responsible for blacks' decreasing participation in the education system. The current lack of participation can also be viewed as a vestige of the state's past discriminatory efforts to discourage participation in the educational system.[66]

b. Disparity in Enrollment Patterns Among the Schools

Of the 1985-86 enrollment, 99% of the system's white undergraduate students and 97% of the white graduate students attended an HWI.[67] Only 194 white students (or 1.8% of the HBI's total enrollment) attended an HBI.[68] Most black students attended an HBI but to a lesser extent: only 70% of the system's black undergraduates attended an HBI and 64% of the graduate students attended an HBI.[69]

As the district court concluded, Mississippi's schools "continue to be identifiable by the racial make-up of the student populations."[70]

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[66] *Petitioner's Brief*, *supra* note 24, at text accompanying n.104. Historically, the state provided no education to blacks. *Id.* at n.106. Thereafter, the state provided separate and unequal education. *Id.* This history has left blacks without a "family tradition of college attendance." *Id.*

[67] *Id.* at text accompanying n.17.

[68] *Id.* at text accompanying n.107.

[69] *Id.* at text accompanying n.17. By school, the level of black enrollment in 1985-86 was as follows:

		Undergraduate	Graduate
HBIs:			
	ASU	95.7%	96.0%
	JSU	91.9	59.0
	MVSU	99.3	96.7
HWIs:			
	DSU	17.6	26.2
	MSU	11.3	7.6
	MUW	17.7	13.2
	UM	5.9	7.5
	USM	13.4	8.1

The seemingly low 59% black graduate population at JSU is explained by the fact that 28% of JSU enrollment are other races. *Id.* at n.17. Comparable to other HBIs, 87% of JSU's enrollment was non-white. *Id.*

[70] *Id.* at text accompanying n.107.

c. Disparity in Employment of Administrative Staffs

Although the State's 1974 Plan of Compliance required the Board to increase the number of black employees at state schools and included those employees at the "managerial" by 1983 only six of the 393 administrators at the HWIs were black.[71] Of the highest administrative levels of HWIs in 1986, all 22 were white even though there had been a turnover of 15 since 1981.[72] Only two blacks have ever held positions in the highest levels of HWIs.[73] Similarly, only about 5% of administrators at HBIs in 1983 were white.[74] At the highest level of administration of the HBIs, there was only one white officer in 1986.[75]

d. Disparity in Faculty Employment

It is clear that the Board "control[s] . . . the hiring of all faculty . . . ."[76] The 1974 Plan of Compliance required the Board to recruit and hire black faculty and to make a special request to the Legislature to fund these requirements. The Plan also cited the potential for "630 additional minority faculty" by 1980.[77]

However, the Board failed to make any such funding request for another three years. Even then, only forty percent of the requested amount was received. Moreover, the Board has failed to hire black faculty on the scale envisioned by the Plan. Of the 2563 HWI faculty members in 1985-86, only 60 (or 2%)

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[71] *Petitioner's Brief, supra* note 24, at text accompanying n.18. For example, in 1983, only 3% of the administrators at UM were black and no black served as academic dean or department head during the period 1975-86. *Id.*

[72] *Id.*

[73] *Id.* at n.18.

[74] *Id.*

[75] *Id.*

[76] *Petitioner's Brief, supra* note 24, at text accompanying n.13.

[77] *Id.* at text accompanying n.23.

were black.[78] UM then had *only 10 black faculty members.*[79]

e. Program, Mission and Branch Discrimination

(1) Disparity in Number and Quality of Programs

In 1974, HWIs offered a total of 724 programs while the HBIs offered only 117.[80] HWIs offered 364 graduate programs while HBIs offered only 24.[81] The HWIs also offered all 110 doctoral programs.[82] Although the 1974 Plan of Compliance "stressed the importance of desirable programs . . . and promised priority [to the HBIs] for new programs;"[83] eleven years later, HWIs offered a total of 497 programs while the total number of HBI programs had increased only to 129.[84] Graduate programs at HBIs remained approximately the same as a percentage of total and doctoral programs at HBIs increased by a total of one.[85] Furthermore, no HBI offered a professional degree in either law, medicine, dentistry or pharmacy and an expert testified that the HBIs offered few "unique high demand programs."[86]

The petitioner also observed the difference in the quality of programs at HBIs as compared to that at HWIs. In 1980, the Board instituted a policy where all programs would be subjected to regular review with the purpose of identifying "marginal programs" in the system.[87] The review revealed that seventy-five percent of all programs classified as "marginal" were offered by an HBI and that this was directly related to a lack of

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[78] *Id.* at text accompanying n.20. The petitioner also noted complaints from those black faculty members who were hired by HWIs. *Id.* at n.13. One black faculty member complained that her office was placed in "the basement of the library" where she "did not see anyone" on some days. *Id.*

[79] *Id.* at n.21.

[80] *Id.* at chart accompanying n.57.

[81] *Petitioner's Brief, supra* note 24, at chart accompanying n.57.

[82] *Id.*

[83] *Id.* at text accompanying n.57.

[84] *Id.* at chart accompanying n.57.

[85] *Id.* at text accompanying n.57. The Board has not fulfilled their promise to allot new programs to the HBIs. Of the 92 new programs implemented from 1976-1986, approximately 20 were located at an HBI. *Id.*

[86] *Petitioner's Brief, supra* note 24, at text accompanying n.60.

[87] *Id.* at text accompanying n.73.

resources.[88] Although intended to be a "path to improve the quality [of system programs]," the Board failed to direct more resources to the HBIs when confronted with the results of it's own review.[89]

(2) Discrimination in the Allocation of Missions

In 1981, the Board established "missions" for each of the eight schools. MSU, UM, and USM [the three major HWIs] were designated "comprehensive" schools indicating that they each would have a greater number of programs, a greater number of fields of study and an increased amount of research. ASU, MVSU [HBIs], DSU and MUW were designated "regional" schools indicating a more limited focus.

The Fifth Circuit found the mission designation to be "necessitated and justified by a need to conserve scarce educational resources"[90] but the petitioner suggested that the purpose of

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[88] *Id.* at text accompanying n.74. The percentage of the total marginal programs by institution were MVSU [HBI] (29%), ASU [HBI] (27%), JSU [HBI] (19%), DSU [HWI] (10%), MUW [HWI] (9%), MSU and UM [HWIs] (3% each) and USM [HWI] (0%). *Id.* at n.74.

[89] *Id.* at text accompanying n.74-75. Institutions with marginal programs were instead expected to "shift resources in house to [correct deficiencies]." *Id.* However, one expert on academic programs questioned the ability of MVSU (an HBI) even to provide "basic undergraduate education" and noted the relationship of the public's perception of the quality of HBI programs with the HBIs' difficulty in recruiting white students. *Id.* at n.59. The same expert had testified at trial concerning a study he had conducted by comparing the HBIs and HWIs based on eight indicators of program quality and concluded that the HWIs were superior in each area. *Id.* at text accompanying n.61. Evidence was also presented that HWI faculties were paid more, held higher academic ranks, were more likely to be tenured and, on the average, were more likely to hold the highest degree in their field. *Id.* at text accompanying nn.62-63. The petitioner also noted a disparity in the quality of land grant programs. *Id.* at text accompanying n.63-65. ASU [HBI] and MSU [HWI] were designated "land grant" institutions which were to provide "instruction in agriculture and mechanical arts [and] research in agriculture . . . ." *Id.* The district court concluded that MSU's land grant programs were "vastly superior" to those offered at ASU but explained that the programs at both were nevertheless "educationally sound" and not discriminatory. *Id.* In response, the petitioner pointed to the history of discriminatory funding between the two schools. *Id.* The legislature directed all federal land grant funds to MSU until 1966 and all state funds to MSU until 1972. *Id.* at n.65. MSU continues to receive a disproportionate share. *Id.*

[90] *Petitioner's Brief*, *supra* note 24, at text accompanying n.82.

the designation was irrelevant. Indeed, the Board members testified at trial that "*then existing* programs, facilities and other educational resources" were *dominant factors in designating each school's mission.*[91] Thus, since these very factors were themselves the results of past discrimination, the Board's mission designation "built upon and perpetuated prior discrimination."[92]

(3) Discrimination In the Operation of Branches

At the time of trial, UM, MSU and USM [HWIs] jointly operated the Universities Center as a branch location in Jackson, the home of JSU [HBI]. USM also operated branches in Natchez and Vicksburg in close proximity to ASU's [HBI] location. The President of JSU has claimed that the Center prevents the integration of JSU's student body and has requested that the Center "either be made a part of [JSU] or eliminated."[93] The petitioner contended that the operation of these branches is discriminatory as it provides a way for whites who reside close to an HBI to attend an HWI instead of an HBI.

f. Disparity in Funding Among Schools

At trial, an expert on funding compared the state's funding of black and white students, regardless of the school they attended. He concluded that during the years 1968, 1980 and 1986, expenditures per white student exceeded that per black student by $777, $774 and $1,840, respectively.[94] In 1986, average total education and general expenditures per HWI student was $8516 compared to $6088 per HBI student.[95]

The district court concluded that these disparities were related to the differences between comprehensive and non-comprehensive institutions and to be expected "[i]f one follows the mission precepts . . . ."[96] The petitioner objected to this ratio-

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[91] *Id.* at text accompanying n.84 (emphasis supplied).
[92] *Id.* at n.87.
[93] *Petitioner's Brief, supra* note 24, at text accompanying nn.55-56.
[94] *Id.* at text accompanying n.66.
[95] *Id.* at chart accompanying n.67.
[96] *Id.* at text accompanying n.67.

nalization as the mission designation itself was based on past discrimination.[97] Thus, the disparity in funding is also "built upon" past discrimination.

g. Disparities in Physical Facilities Among Schools

The district court concluded that the "character of the [HBIs] in 1954 was acknowledged to be inferior or unequal to [the HWIs] . . . ."[98] The court explained that "character" might include objective factors such as age, construction type, design and condition of campus buildings.

The petitioner conceded that the adequacy of space and the state of repair at the HWIs and HBIs was ambiguously discriminatory. However, an expert testified at trial that the general quality of the HBI facilities was inferior and lacking in "ambience".[99] Furthermore, the expert noted that the book value and replacement cost of plant and equipment were similarly inferior.[100]

The district court concluded that the Board provided facilities to each institution *commensurate with their mission*. As noted, the mission designation itself was discriminatory and the court therefore used a "discriminatory criterion to measure the adequacy of facilities."[101]

h. Discrimination and Harassment at UM

UM officials, faculty and police were singled out as guilty of discriminatory practices. The petitioner recounted instances of faculty harassment,[102] the withholding of services,[103] un-

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[97] *Id.* at text accompanying n.114.

[98] *Petitioner's Brief, supra* note 24, at text accompanying n.75.

[99] *Id.* at text accompanying n.78.

[100] *Id.* at chart accompanying n.78. For example, the equipment book value at each HBI averaged $3,488,814 compared to $15,866,329 at each HWI. *Id.* The replacement value of the physical plant at each HBI averaged $56,022,653 compared to $150,419,646 at each of the HWIs. *Id.*

[101] *Id.* at text accompanying n.81.

[102] *Id.* at n.48. In one instance, a faculty member stated "I guess we can start, the 'nigger' has arrived." *Id.*

[103] *Petitioner's Brief, supra* note 24, at n.49. The petitioner noted instances where blacks received inadequate counseling, received smaller grants than whites, or were unable to secure fraternity housing. *Id.*

fair grading,[104] and inaction by campus police.[105] The petitioner also noted that black students were harassed by other students[106] and were the targets of racially-offensive articles in the campus newspaper.

The petitioner noted that *Brown's* protection "encompassed equal services, fair grading, freedom from degradation, and a safe environment."[107] Any UM employee involved in such misconduct was an officer of the State and therefore subject to the requirements of the Fourteenth Amendment. Furthermore, the officials' and students' misconduct was another example of "vestiges of years of discriminatory state action . . . ."[108]

3. Proper Identification of Available Remedies

a. The Propriety of a Remand for Remedial Review

The petitioner observed that 27 years had passed since "[t]he time for 'mere deliberate speed' . . . [ran] out."[109] The time for further consideration of the state's liability has passed and now the Court should remand *Ayers* to the trial court for remedial proceedings. The lower courts denied the petitioner a remedial hearing reasoning that such a hearing would be unproductive or destructive of the current system. Claiming this assessment to be "speculat[ive]," the petitioner attacked the courts' view that the state's administration of the higher education system was insulated from remedial review.[110] According

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[104] *Petitioner's Brief, supra* note 24, at n.50. Among others, the petitioner noted instances where the faculty stated "Black people have an inherent problem in mastering the English language" and "I do know that black folks don't write that well" and instances where black students received poor grades after writing on integration. *Id.*

[105] *Id.* at n.51. The petitioner noted instances where blacks were harassed but the campus police failed to provide aid. *Id.*

[106] *Id.* at n.53. The petitioner noted that the school's first black cheerleader received death threats and was pelted with objects while cheerleading because he wouldn't carry the school's confederate flag. *Id.*

[107] *Id.* at n.123 and accompanying text (citing United States v. Jefferson County Bd. of Educ., 380 F.2d 385, 393 (5th Cir. 1967) (en banc) (requiring nondiscrimination in provision of any service)).

[108] *Petitioner's Brief, supra* note 24, at text accompanying n.124.

[109] *Id.* at n.137 (citing Griffin v. County School Bd., 377 U.S. 218, 234 (1964)).

[110] *Petitioner's Brief, supra* note 24, at text accompanying n.134.

to the petitioner, the state's interest in autonomy is properly considered only in a remedial proceeding and only if the state's goal is consistent with the Constitution.[111] Given that the state's ultimate goal of discrimination was repugnant to the Constitution, the courts' deference to the state in the liability context was in error.

b. Proposed Remedies Available to the District Court On Remand

The petitioner asserted his right to a consideration of the available remedies which inured when the requisite connection between past discrimination and current circumstances was established.[112] Seeking an approach similar to *Brown*, the petitioner cautioned the Court to exercise due discretion when fashioning suitable remedies.[113] The goal of any remedies should be to bring more education to blacks, increase each race's access to non-traditional schools,[114] and to carefully avoid decreased enrollment or destruction of HBIs.[115]

The Court should also take care to avoid the use of remedies which promote the view that whites are superior to blacks. For example, the ordered closing or downgrading of HBIs would serve only to reinforce the view that the education of white citizens is more important to this state. Indeed, the HBIs have played an important role in the state having educated most of it's black citizens.[116] Remedial measures must elevate

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[111] *Id.* (citing *Milliken*, 433 U.S. at 267).

[112] *Petitioner's Brief*, *supra* note 24, at text accompanying n.14 (citing *Dowell*, 111 S.Ct. at 638; *Keyes*, 413 U.S. at 206).

[113] *Id.* at text accompanying n.140 (citing *Milliken*, 433 U.S. at 280 (warning of potential for "burdensome effects")).

[114] *Id.* at text accompanying nn.140-41. At oral argument, the petitioner's counsel conceded that "some type of racial identifiability" would remain on campuses. *Petitioner's Oral Argument*, *supra* note 6. The ultimate objective, however, should be to provide a "better . . . desegregated education through a fair process." *Id.*

[115] *Petitioner's Brief*, *supra* note 24, at text accompanying n.142. The petitioner suggested that the Court's remedial order include instructions for the district court to promptly address each vestige of discrimination that had been identified, develop lawful admission standards and allow the plaintiffs the opportunity to respond to the state's proposed remedies. *Id.*

[116] *Id.* at text accompanying n.56. In 1985-86, 70.3% of black undergraduates attended an HBI. *Id.* at text accompanying n.24. HBI graduates have served the

them to a "real partnership" in Mississippi's higher education system.[117]

III. The United States' Argument

A. *Introduction*

As noted earlier, the United States by its Attorney General filed a complaint-in-intervention and joined the private petitioner in asserting that Mississippi had maintained and perpetuated an unlawful dual system of higher education. However, the United States position was unique to that of the private petitioner in it claims that Mississippi had failed to meet its obligation to dismantle its racially dual system of colleges and universities.

The private petitioner argued that the standard set forth by the Court in *Green* should be used to determine if the State had meet its obligation to dismantle its dual system of higher education.[118] In addition, the private petitioner argued that the standard in *Bazemore*, as argued by the State, had no applicability in the context of public higher education.[119] Of course, as discussed earlier the State contended that the standard of *Bazemore* did apply more so than *Green* because as with the 4-H Clubs in *Bazemore*, once a student decided to enroll in a university, the choice of which university to attend was left up to her free choice.[120]

The United States disagreed with both the private petitioner's and the respondent's position of the proper standard to be used by the Court. The United States, unlike the private petitioner, contended that *Bazemore* did apply in higher education.[121] However, the United States disagreed with the State's view of the *Bazemore* standard being satisfied by merely

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state well. *Id.* MVSU has played a particularly vital role in supplying teachers and administrators to the residents of the state's oppressed Delta area. *Id.*

[117] *Id.* at text accompanying n.142.

[118] *See supra* notes 32-41 and accompanying text.

[119] *See supra* notes 19-31 and accompanying text.

[120] *See supra* notes 31-32 and accompanying text.

[121] United States Brief at text accompanying n.30, United States v. Fordice, 112 S. Ct. 2727 (1992) (Nos. 90-1205, 90-6588) [hereinafter *United States' Brief*].

discontinuing prior "discriminatory practices and adopting and implementing good-faith, race-neutral policies and procedures."[122] Thus, in presenting its argument, the United States first established what it contended was the proper standard to measure whether the State had met its obligation. It then presented examples of discrimination that are inherent in the State's higher education system that show the State failed its obligation.

B. The Standard to Determine Whether a Formerly Dual System of Public Education Has Achieved Unitary Status

The court of appeals in its en banc decision determined that higher education was unique to other levels of education and therefore a different standard should be applied.[123] Under its standard, "a State should be deemed to have satisfied its constitutional obligation by discontinuing prior discriminatory practices and adopting and implementing good-faith, race-neutral policies and procedures."[124] This standard was adopted based upon the United States Supreme Court's decision in *Bazemore*. The court of appeals reasoned that the decision to attend a university in addition to which university to attend, was based on the student's free choice.[125] As such, the court concluded, when a state has initiated race-neutral policies and procedures and eliminated prior discriminatory practice, it no longer interfered with an individual's choice.

The United States contended the court of appeals decision, which agreed with the respondent's position, was flawed.[126] The United States argued that the United States Supreme Court had established one standard to determine whether a State had achieved a unitary status in a formerly dual system of public education.[127] It determined this standard was set forth from the Court's decisions in *Bazemore*, *Green* and *Board*

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[122] *Id.* at text accompanying note n.28 (quoting *Ayers III*, 914 F.2d at 687).
[123] *Ayers III*, 914 F.2d at 685-87.
[124] *Id.* at 687.
[125] *Id.* at 686-87.
[126] *United States' Brief, supra* note 121, at text accompanying n.30.
[127] *Id.* at text accompanying n.29.

of Education v. Dowell.[128] It stated that "a State's dismantlement of a segregated system of public education is complete when the State has terminated its policy of intentional discrimination, adopted race-neutral policies and practices, and eradicated, to the extent practicable the remnants of unlawful discrimination."[129] They argued that this standard as established by those cases should apply regardless of whether the system involves primary, secondary, or higher education.[130]

The United States' disagreement with the decision of the en banc court of appeals, and in effect the respondent's position, was that it did not require the State to address any remnants of past discrimination. While the court of appeals relied upon *Bazemore* as the basis for the standard, the United States pointed out that the *Bazemore* decision confirmed that where "the vice to be remedied is state interference with individual choice on the basis of race, a State fulfills its constitutional obligation by taking the necessary affirmative steps to ensure that an individual's choice is wholly voluntary and unfettered."[131] The United States stated that Mississippi's dual system had fettered the choice of students on the basis of race, and the question that remained was whether the State's actions continued to fetter choice.[132] The United States went on to argue that:

> [a] State can interfere with choice on the basis of race by indirect as well as direct means, and nothing in *Bazemore* suggests that a State is relieved of its obligation to cure any remnants of prior *de jure* segregation that continue to fetter choice on the basis of race.
>
> In short, *Bazemore* teaches that a State fulfills its obligation to dismantle its dual system of higher education when a graduating high school senior's choice of which public college to attend is "wholly voluntary and unfettered" by state action based on race. . . That is because a system of higher education, like the 4-H Clubs at issue in *Bazemore*, is a regime in

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[128] 498 U.S. 237 (1991).
[129] *United States' Brief, supra* note 121 at text accompanying n.27.
[130] *Id.* at text accompanying n.29.
[131] *Id.*
[132] *Id.*

> which individual choice is the key factor. *Green*, however, teaches that saying so does not make it so, and that the remnants of prior illegal conduct can fetter choice and render a facially neutral plan discriminatory in operation. Collectively, *Bazemore* and *Green* teach that, in the context of higher education, a State's adoption of a "freedom of choice" admission policy to desegregate a racially dual university system "merely begins, not ends, [the] inquiry whether the Board has taken steps adequate to abolish its dual, segregated system." . . . Specifically, a State also must ensure that it has eliminated, to the extent practicable, remnants of the dual system that may fetter free choice . . . . [133]

Thus, the United States agreed that *Bazemore* was applicable, however, their position was that it had to be taken in conjunction with the equal protection principles laid down in *Green* and *Dowell* in order to provide the proper standard. It was in this context that the United States disagreed with the private petitioner's argument that *Bazemore* did not apply and that the standard should be taken solely from *Green*.

Once the United States had established what it contended to be the proper standard, it then developed an analyses of past remnants of discrimination that still exist in Mississippi that fetter free choice.

C. Continued Remnants of Past Discrimination

The United States defined a remnant as "a part of a formerly dual system that has had and continues to have a discriminatory effect."[134] It then argued that it had produced evidence showing that Mississippi had not eliminated all remnants of its past system.[135] Thus, Mississippi had failed to meet its obligation to dismantle its dual system in accordance with the above standard. The remnants, the United States argued, that still exist are (1) the State's use of the ACT (American College Test) in its admission policies, and (2) duplicate programs at both HBIs and HWIs.

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[133] *Id.* at text accompanying n.30.

[134] *United States' Brief*, *supra* note 121, at text accompanying n.31.

[135] *Id.* at text accompanying n.34.

1. *Use of the ACT*

Mississippi's universities use the ACT score alone in determining automatic admissions.[136] The United States argued that use of the ACT without looking to any other element of the student's ability was a remnant of the past dual system that could be eradicated.[137] Their argument was based upon four premises.

First, minimum ACT scores for admission requirements were adopted in 1963 only after James Meredith, a black student, applied for admission to the University of Mississippi.[138] Second, the policy of minimum scores was effective in directing black students away from enrolling at and attending HWIs.[139] Third, the "exclusive reliance on ACT scores [lacks] a legitimate educational justification."[140] High school students' grades in conjunction with ACT scores would be a much better indicator of college performance.[141] Finally, the exclusive use of ACT scores for admission purposes can easily be eradicated as "most other states use high school grades and other criteria in conjunction with ACT scores to determine college admissions."[142]

2. *Duplication of Programs at HWI and HBI*

There is no doubt that Mississippi's HWIs duplicate programs offered at the HBIs. This duplication is indeed a remnant of past discrimination as the "notion of 'separate but equal' universities rests on the establishment of duplicative educational programs for white and black students."[143] This

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[136] *Id.* at text accompanying n.35.

[137] *Id.* at text accompanying n.35.

[138] *Id.* Shortly thereafter, three of the HWI's raised their minimum ACT score to 15. *Id.*

[139] *United States' Brief, supra* note 121, at text accompanying n.35. For example, "in 1985, more than 70% of all white Mississippi students — but less than 30% of all black Mississippi students — who took the ACT received a score of 15 or higher." *Id.* at text accompanying n.34.

[140] *Id.* at text accompanying n.35.

[141] *Id.*

[142] *Id.*

[143] *Id.* at text accompanying n.36.

duplication perpetuates segregation by affecting students' choices because it sends a message from the State to students that there are schools for whites and schools for blacks.[144]

In addition to duplicate programs promoting "separate but equal (or unequal)" and affecting choice, duplication serves no useful educational purpose. For example, "Delta State and Mississippi Valley State, only thirty-five miles apart in the rural, financially strapped Mississippi Delta, cannot be justified economically or in terms of providing quality education."[145]

Finally, the duplication of programs, just as with exclusive use of the ACT for admissions, can be eradicated by consolidating the duplicative programs in a manner that eliminates those affected. The United States did not argue that "HWI and HBI remain equal in funding, offerings and facilities . . . [but urged] that Mississippi [could] eliminate program duplication by the cost-effective technique of modifying and consolidating programs that persist despite their inefficiencies and wastefulness."[146]

D. Mississippi Has Failed to Satisfy Its Identical Obligation Under Title VI of the Civil Rights Act of 1974 to Dismantle its Racially Dual System of Higher Education

The United States stated that Mississippi had the same obligation to dismantle its dual system under Title VI of the Civil Rights Act of 1964 as it had under the Equal Protection Clause of the Constitution.[147]

It based this interpretation of Title VI on the Department of Education's Title VI regulation that provides: "In administering a program which the recipient has previously discriminated against persons on the grounds of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination."[148] As such, once the earlier

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[144] *United States' Brief*, *supra* note 121, at text accompanying n.36.
[145] *Id.* at text accompanying n.39.
[146] *Id.*
[147] *Id.* at text accompanying n.40.
[148] *Id.*

stated standard under the Constitution is achieved, Title VI requirements will also be met.

IV. THE RESPONDENT'S ARGUMENT

The Respondent essentially put forth a two-prong argument: (1) that the State, under the *Bazemore* standard, had fulfilled its duty under the Fourteenth Amendment to disestablish segregated universities and colleges by adopting and implementing in good-faith nondiscriminating policies; and (2) that Title VI of the Civil Rights Act of 1964 does not impose a greater duty to disestablish state-imposed segregation than does the Constitution.

A. Mississippi Has Met Its Constitutional Obligation Under Bazemore

1. Bazemore is the Proper Standard

Throughout, the Respondents argued that the appropriate standard is derived from *Bazemore*: discontinuation of prior discriminatory policies and adoption and implementation of good-faith, race-neutral policies and procedures. Acknowledging the duty imposed by *Brown v. Board of Education*[149] to eliminate discriminatory dual education and make available on equal terms educational opportunities, the State pointed out that the United States Supreme Court has never imposed a duty to disestablish statewide higher education beyond implementation of good-faith nondiscriminatory policies and practices.[150] Although *Green*[151] rests firmly on *Brown*, respondents

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[149] 347 U.S. 483 (1954).

[150] *Respondent's Brief*, *supra* note 8, at text accompanying n.27. There is "a 'vast difference - a constitutional difference - between' state-imposed racial bars and racial identifiability continuing on account of individual choice." *Id.* (quoting McLaurin v. Oklahoma State Regents, 339 U.S. 637, 641 (1950)).

[151] *Id.* The facts surrounding the *Green* case showed that the county maintained two separate schools, each a combined elementary/secondary school. New Kent school on the east side of the county was predominantly white; Watkins school, on the western side of the county was completely black. The schools each served the entire county since there were no established attendance zones; and, in fact, the schools maintained overlapping school bus routes throughout the county. *Green*, 391 U.S. at 432. This dual system, despite *Brown*, remained unchanged

argued that it is not the correct standard to apply to the university setting. Distinguishing the controlled, mandatory environment of elementary/secondary public education, to which *Green* is limited,[152] from that of higher education,[153] respondents argued that it is the "explicit sanction in *Bazemore* of

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until 1964. Faced with the Title VI mandate and the loss of federal funds, the county school board implemented a freedom-of-choice plan. Despite the fact that the plan allowed students to choose which school they would attend, no white student chose Watkins and only fifteen percent of the black students chose New Kent. *Id.* at 441. The opinion of the United States Supreme Court was short and direct. The Court told the local school board "to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.* at 437-38. Justice Brennan wrote the opinion for a unanimous Court. *Id.* The Court clearly "showed impatience with a recalcitrant school board which refused to implement feasible and educationally sound measures to end state-imposed segregation in a two-school system," *Respondent's Brief*, *supra* note 8, at n.29 and accompanying text, and subsequently, "the Court properly identified the freedom-of-choice program [in *Green*] as a subterfuge." Keyes v. School Dist. No. 1, Denver, Colorado, 413 U.S. 189, 221 (1973) (Powell, J., concurring and dissenting).

[152] *Respondent's Brief*, *supra* note 8, at n.26 and accompanying text. Following closely behind *Green*, a three-judge court in *ASTA* concluded that "the duty to disestablish or 'dismantle' a dual higher education system is necessarily fulfilled by the adoption and implementation of good-faith nondiscriminatory practices." Alabama plaintiffs sought to prevent the State from expanding a branch of Auburn University into an area close to Alabama State Teachers College, a predominately black school. The plaintiffs argued that the State was maintaining its *de jure* dual system of higher education and should be held to the standards of *Green*, and its progeny. The court rejected the plaintiffs argument, stating instead that "we do not interpret [*Green* and its progeny] as applying to the operation of an education system on a college level."*ASTA*, 289 F. Supp. at 790. The court reasoned that student choice in higher education necessarily requires that the student "face the full range of diversity in goals, facilities, equipment, course offerings, teacher training and salaries, and living arrangements" which historically have marked higher education throughout the nation. *Id.* at 788. The court of appeals correctly observed that the Court's summary affirmance of Norris v. State Council of Higher Education for Virginia, 327 F. Supp. 1368 (E.D. Va.), *aff'd*, 404 U.S. 907 (1971), is not inconsistent with *ASTA*. The lower court in *ASTA*, unlike *Norris*, found state action did not perpetuate the racial identity of the higher institutions. *ASTA*, 289 F. Supp. at 789. The United States Supreme Court, in a memorandum opinion, affirmed. Alabama State Teacher's Assoc. (ASTA) v. Alabama Public Sch. & College Auth., 393 U.S. 400 (1969) (per curiam).

[153] *Respondent's Brief*, *supra* note 8, at n.28 and accompanying text.Elementary and secondary education is unlike a university education since the former is universally available, mandatory, rigidly controlled, and uniform rather than diverse by design. Local school board officials can alter racial composition of elementary or secondary schools by manipulation of faculty and student assignment. *Id.*

nondiscriminatory policies where individual choice determine[s] participation that delineates the duty to disestablish in higher education."[154] *Green*, the respondents argued, only provides "a classic example of utilizing available and practical means to insure immediate integration of schools within an insular school district. It does not forbid any unlawful conduct other than intentional discrimination."[155]

Respondents noted that in *Bazemore*,

> [t]he Court did not remotely require any comparative examination of program duplication or the relative attractiveness of any club activity to blacks and whites. The Court neither undertook nor suggested any determination whether all "practicable" efforts had been expended to alter the racial makeup of clubs. Instead, the Court unhesitantly rejected application of *Green* to the "wholly different milieu" of noncompulsory educational programs.[156]

Respondents found additional support in Justice Scalia's later observation:

> Our analysis in *Bazemore v. Friday* . . . reflected our unwillingness to conclude, outside the context of school assignment, that the continuing effects of prior discrimination can be equated with state maintenance of a discriminatory

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[154] *Id.* at n.27 and accompanying text. The facts in *Bazemore* showed that prior to 1965 the North Carolina Agricultural Extension Service assigned students according to race for participation in 4-H or homemaker clubs. *Bazemore*, 478 U.S. at 407 (White, J., concurring). Thereafter, "in response to the Civil Rights Act of 1964 the Service discontinued its segregated club policy and opened [the clubs] to any otherwise eligible person regardless of race." *Id.* The problem, however, was that a great many all-white and all-black clubs remained. The Court's holding, based on these facts, could not be clearer: "[T]his case presents no current violation of the Fourteenth Amendment since the Service has discontinued its prior discriminatory practices and has adopted a wholly neutral admissions policy." *Id.* at 408 (White, J., concurring). This holding focused on the absence of evidence of present discrimination versus the alleged continuance of "discriminatory effects" of state-imposed segregation.

[155] *Respondent's Brief*, *supra* note 8, at text accompanying n.28.

[156] *Id.* at n.27 and accompanying text. Respondents also pointed out that Petitioners claim *Bazemore* rests on the absence of differences among clubs, but if "the clubs were identical, North Carolina was guilty of 'program duplication' far more pervasive than that which allegedly exists in Mississippi." *Id.*

> system. There we found both that the government's adoption of "wholly neutral admissions" policies for 4-H and Homemaker clubs sufficed to remedy its prior constitutional violation of maintaining segregated admissions, and that there were no further obligations to use racial reassignments to eliminate continuing effects - that is, any remaining all-black and all-white clubs . . . . "[H]owever sound Green may have been in the context of the public schools," we said "it has no application to this wholly different milieu."[157]

Thus, respondents contended that the proper standard for the Court to apply in the area of higher education is *Bazemore*.

a. Petitioner's Position Countered

The petitioners attempted to distinguish *Bazemore* on three grounds. First, their advancement of purported "remedial possibilities" (while none were allegedly urged in *Bazemore*) "skirts the threshold liability determination of whether a constitutional violation exists."[158] Private petitioners' second point of distinction, that higher education is more important than 4-H clubs, fails, respondents argued, because since "*Bazemore* makes no constitutional differentiation according to perceived value of the state-sponsored activity and no other decision of this Court suggests such a sliding scale."[159] The third purported basis for distinguishing *Bazemore* concedes applicability of the *Bazemore* legal standard and merely raises factual questions rejected by both lower courts.

b. The United States Position Countered

Arguments before the United States Supreme Court must, of course, be true to the record. Yet, the United States in its brief "self-servingly ignore[s] the court of appeals and district

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[157] City of Richmond v. J. A. Croson Co., 488 U.S. 469, 525 (1989) (Scalia, J., concurring).

[158] *Respondent's Brief*, *supra* note 8., at n.31 and accompanying text.

[159] *Id.* The court of appeals properly identified this relativistic contention "as an improper 'hierarchy of values,'" and aptly described "such a hierarchy [as] purely subjective, impossible to apply, and not founded on the Constitution." *Ayers III*, 914 F.2d at 686.

court findings that 'real freedom of choice' exists."[160] The United States "disingenuously articulates its suggested hybrid standard: remove 'remnants' which 'fetter free choice by race.'"[161] This proposed standard, respondents argued, ignores both the record and the holdings of *Green*, *ASTA*, and *Bazemore*.[162] The United States, even though acknowledging that *Bazemore* specifically refused to extend *Green* to a traditionally noncompulsory arena, nonetheless argued that something more than *Bazemore* is required to assure that Mississippi does not fetter choice by race.[163] However, "[g]enuine nondiscriminatory policies by their very definition do not impermissibly fetter choice by race."[164]

2. *Mississippi Has Met Its Duty to Disestablish*

Although the State of Mississippi admittedly maintained a segregated system of higher education through at least 1962, the Board of Trustees and the universities subsequently implemented, nonracial admissions and employment practices. Arguing that the petitioner's claims unduly focused on historical acts and ignored the actions of the State in implementing race-neutral nondiscriminatory policies, the respondents offered the following to supplement the record and more accurately portray the Mississippi higher education environment today.

a. The Parties' Contentions at Trial

At the trial, petitioners sought to prove their claim of "dis-

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[160] *Respondent's Brief*, *supra* note 8, at n.32 and accompanying text.

[161] *Id.*

[162] *Id.* In response, respondent pointed to the district court's joint reading of *Green* and *Bazemore*:

> The court perceives no inconsistency with respect to the Supreme Court decisions *Green* and *Bazemore* and the *ASTA* decision. These decisions stand in harmony for the proposition that the scope of the affirmative duty to disestablish a former de jure segregated system of education is to be defined in accordance with the degree of choice individuals enjoy as to whether they wish to attend college at all and, if so, which one.

Id. at n.33 (quoting *Ayers I*, 674 F. Supp. at 1553).

[163] *Id.* at text accompanying n.32.

[164] *Id.*

establishment" by alleging discrimination in the allocation of resources to the predominantly black universities and, as a remedy, they sought the "equalization" of resources between the predominantly black and predominantly white universities. Secondly, while advancing no proof or plan as to a satisfactory racial mixture, the petitioners demanded a greater black presence at the predominantly white universities.[165] The State's efforts at increasing the enrollment of other-race students, faculty and staff at all state universities was simply ignored.

The State maintained at trial that it had "fulfilled its duty to disestablish state-imposed segregation by implementing and maintaining good faith, nondiscriminatory and nonracial admissions and operational policies with respect to students, faculty and staff."[166] The State argued, alternatively, that given the nondiscriminatory policies, the State had fulfilled its duty through its efforts to attract qualified black students and personnel to predominantly white universities and qualified white students and personnel to predominantly black universities.

b. The Factual Record

Respondents argued that the record clearly showed a Board implemented formal plan to promote desegregation. The plan became known as the "Plan of Compliance"[167] and it was aggressively implemented. The plan identified its basic objective as "the improvement of educational opportunities for all citizens of the State of Mississippi with particular emphasis on equal access and retention for members of minority races"; the plan repeatedly asserted as its fundamental goal the attraction

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[165] *Respondent's Brief, supra* note 8, at n.2 and accompanying text. The petitioners' proof "overwhelmingly consisted of quantitative institutional comparisons according to predominant racial presence." *Id.* The United States, on the other hand, did not "submit a single government representative for deposition on any issue." *Id.*

[166] *Id.* The State's proof at trial showed the magnitude of special programs and efforts focusing on the recruitment and retention of other-race students. *Id.*

[167] *Id.* at n.3 and accompanying text. The Board was unable to come to an official agreement with HEW's Office of Civil Rights mainly over the issue of a comprehensive desegregation of the junior (community) college system which spans the entire State and enrolls over 60% of all Mississippi students electing to participate in public higher education. *Id.*

of other-race students, faculty and staff to each university.[168]

(1) Student Recruitment

The record shows that to date, the state's universities expend every reasonable effort to increase the enrollment and retention of other-race students. The record is full of examples of steps taken, including "financial assistance and minority scholarship programs; consortiums; cooperative, graduate and professional opportunity programs with junior colleges and universities with substantial other-race enrollment; sponsorship of programs such as 'Black History Week' and 'Black Awareness Month;' and maintenance of campus offices of minority student affairs."[169]

Additionally, respondents' proof at trial showed that the efforts of the universities do not end upon enrollment. Minority students enjoy completely desegregated campuses and have excelled in campus life. Other-race students have been 'elected to the universities' Hall of Fame, to Who's Who in American Colleges and Universities, Mr. University and homecoming queen. These students have participated in intercollegiate or intramural athletics, as varsity cheerleaders, in scholastic honorary societies, in bands and in performing groups."[170] Minority students have also assumed leadership positions in student government, and other extracurricular associations, such as university publications and residence hall organizations.[171]

(2) Admission Standards

A first-time freshman applicant desiring admission to a university in Mississippi must first complete a preparatory curriculum and achieve a satisfactory score on the American

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[168] *Id.* at n.5 and accompanying text.

[169] *Id.* at n.6. Still another example of the ongoing efforts in this area is the fact that "representatives of the predominantly white universities annually visit more than 100 predominantly black high schools, and representatives of the predominantly black universities expend similar efforts with respect to predominantly white high schools." *Id.*

[170] *Respondent's Brief, supra* note 8, at n.5 and accompanying text.

[171] *Id.*

College Test (ACT). These requirements are almost universally followed in other states. The satisfactory score requirement on the ACT, as set by the Board, is extremely low compared to institutions having selective policies of admission. Respondents note that, in fact, the ACT scores needed for automatic admission to a Mississippi university are extremely modest levels of achievement; scores of 15 are just on the verge of a freshman reading level and a score of 9 indicates a student is just reading at a ninth grade level.[172]

Additionally, respondents proved that no student, even a student that initially fails to achieve the modest goals established for first-time enrollment, is ever ultimately denied the opportunity to obtain a university degree. Students may enroll at public junior colleges without taking the ACT and then may transfer after completing as few as 15 hours.[173] These admission standards, when reviewed as a whole by an ACT regional vice president, were found to be reasonable.[174]

Respondents further argued that nothing in the record leads to the conclusion that today's admission standards are linked to the state's distant past discrimination. The standards were implemented out of a statewide concern for student quality. No legitimate argument can be made that the admission policies discriminatorily affect blacks. The record shows that "virtually no black students are denied admission to the predominantly white universities" as a result of a low ACT score.[175] Additionally, no proof exists that the admission stan-

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[172] *Id.* at n.8. "An expert for the United States appropriately characterized scores of 10 and 11 as 'drastically low' and certainly not indicative of academic readiness for university instruction." *Id.*

[173] *Id.* at n.9 and accompanying text. Thousands of students in Mississippi, the record shows, elect to attend junior colleges. A substantial number of these students subsequently transfer to public universities. *Id.*

[174] *Id.* The ACT official did acknowledge that the Board's practices may not comport exactly with every ACT suggestion, but he emphasized the reasonableness of the standards. *Id.*

[175] *Respondent's Brief, supra* note 8, at n.9 and accompanying text. The respondents support their statement with the following examples:

Mississippi State University denied admission to no applicant scoring above 11 on the ACT; the University of Mississippi denied admission to only nine black freshmen applicants who completed the admission process; and the University of Southern Mississippi has been unable in recent years to fill its quota of students who

dards "channel" blacks to a predominantly black university.[176]

Finally, respondents asked the Court to note the United States Secretary of Education's position regarding the well-known educational crisis facing this nation. The National Commission on Excellence in Education created by the Secretary unequivocally recommended that universities "adopt more rigorous and measurable standards, and higher expectations, for academic performance and student conduct . . . and raise their requirements for admission."[177]

(3) Faculty / Staff Employment

Although the United States abandoned its faculty and staff employment contentions, the private plaintiffs continued to press their claim of under-representation of black faculty at the predominantly white institutions. Respondents argued that this claim ignored the overwhelming proof of considerable affirmative efforts taken by the universities to attract, employ, and retain black faculty. The record shows examples of the affirmative steps taken, including a multitude of programs and special support.[178] Respondents were confident enough in their efforts in this area to state that "[t]here is simply no other recruitment procedure which the State could implement which would assure greater minority faculty representation at the predominantly white institutions."[179]

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score below 15 because of an insufficient number of applicants whose high school record otherwise warranted admission.

Id.

[176] *Id.* An eminently qualified statistician demonstrated at trial that the institutions are not predominantly black because black students who first prefer to attend a predominantly white institution were "channeled" to black universities after failing to obtain a 15 on the ACT. *Id.*

[177] *Id.* The Secretary specifically directed that "standardized tests of achievement (not to be confused with aptitude tests) . . . be administered . . . particularly from high school to college . . . to certify the student's credentials." *Id.*

[178] *Id.* at n.10 and accompanying text. Some of the examples of this effort are the establishment of equal employment officers, advertisement of openings in publications of special minority interest, exchange programs, and special funds for minority salary supplementation. *Id.*

[179] *Id.*

(4) Institutional Resources

Private petitioners argued that "resources must be redistributed to remedy the alleged 'discrimination in resource allocation' to which blacks are subjected."[180] However, the United States conceded that there is no legal obligation "to correct disparities between what was provided historically black schools - in terms of funding, programs, facilities, and so forth - and what was provided historically white schools."[181] Respondents acknowledged that institutional differences do exist, but argued that the record establishes such differences do not create "discrimination." Blacks benefit substantially from the educational opportunities offered on a nondiscriminatory basis by those universities with superior resources.[182]

To counter petitioners' arguments concerning mission, funding, program allocation, and facilities, respondents offered the district court's findings:

> [T]here are no additional faculty and staff recruitment procedures available for [s]tate implementation which offer any meaningful prospect of greater minority presence; there is no feasible, educationally reasonable means of further reducing program duplication which "would offer any hope of substantial impact on student choice;" physical facilities appropriations disproportionally favor the predominantly black universities over the past 15 years and no racial institutional pattern exists concerning either the amount or condition of facility space; institutional funding differences are educationally based and unrelated to race except to the significant extent the predominantly black institutions have actually been favored; and the continued racial identifiability of the universities is 'the result of a free and unfettered choice on the part of individual students.[183]

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[180] *Respondent's Brief, supra* note 8, at n.12 and accompanying text.
[181] *Id.* (quoting United States Brief at 32).
[182] *Id.*
[183] *Id.* at n.58 (citations omitted).

3. Continued Racial Identifiability of Mississippi Universities is the Result of Free and Unfettered Choice

During the history of this litigation, the district court spent years supervising discovery, months planning the trial, and weeks conducting a full trial. The court was completely aware of all relevant facts, statistics, testimony, briefs, and arguments. It was only after gaining this information that an opinion was delivered. In that opinion, the district court "unhesitantly concluded that the State has implemented race-neutral polices and substantial affirmative efforts with respect to student admission and recruitment, faculty employment, and resource allocation."[184] Additionally, the district court specifically found Mississippi students possessed a "free and unfettered choice" of a public university.[185]

a. Current Nondiscriminatory Admission Standards Do Not Cause Continued Racial Identifiability.

The district court said it plainly and unmistakably:

> [T]he current admission policies and procedures . . . were adopted and developed in good faith and for nondiscriminatory purposes . . . . Although the various institutions continue to be identifiable by the racial makeup of the student populations, this is not a substantial result of current admission practices and procedures but is instead the result of a free and unfettered choice on the part of individual students.[186]

Noting that petitioners' arguments to the contrary had been twice rejected, respondents argued that "the contention that just because the State's original use of the ACT long ago may have been rooted in discrimination mandates a finding

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[184] *Id.* at n.38 and accompanying text.

[185] *Respondent's Brief*, *supra* note 8, at n.38 and accompanying text (quoting *Ayers I*, 674 F. Supp. at 1558).

[186] *Ayers I*, 674 F. Supp. at 1558.

that today's admission standards implemented under totally different circumstances are intentionally discriminatory is clearly wrong."[187] The petitioners' challenge of the present admission standards finds no support in the record. Respondents show:

> [T]he record flatly contradicts any assumption that the presently lower admission standards at the predominantly black universities are responsible for their "racial identifiability." More white students receive ACT scores between 9 and 14 than black students. (Citation omitted). Further, before taking the ACT, students indicate their college preferences or 'choices'; black students do not on any statistically significant basis first choose to attend a predominantly white university and subsequently switch to a predominantly black university after scoring below 15. Moreover, virtually all black applicants to the predominantly white universities are admitted.[188]

b. Assignment of Missions and Allocation of Resources Do Not Cause Continued Racial Identifiability

Respondents presented the following facts as undisputed: (1) the importance and prevalence of diversity in higher education; (2) the educational reasonableness of the present missions of the state's eight universities; (3) Jackson State University's status as the state's only urban university possessed of a more comprehensive mission than either Delta State University or Mississippi University for Women; (4) the absence of any racial correlation in resources among Alcorn State University, Delta State University, Mississippi University for Women, and Mississippi Valley State University, the State's four regional universities; (5) the relative under funding of the State's three comprehensive, predominantly white universities, when compared to other states' comprehensive universities; and (6) the relative over funding of the States's noncomprehensive universities, three of which are predominantly black, on a peer

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[187] *Respondent's Brief, supra* note 8, at n.39 and accompanying text.
[188] *Id.*

basis.[189]

Despite this uncontested evidence, petitioners still maintained an unlawful correlation exists between racial identifiability and resources. Private petitioners "purport to rationalize their challenge of resource allocations to the predominantly black universities with two hypotheses: (i) the alleged deficient resources inhibit desegregation; and (ii) the alleged inadequate resources deprive blacks at these institutions of equal educational opportunities."[190] Again, respondents countered that "there is no demonstrable relationship in this record between resources and racial presence."[191]

The United States focused its challenge on allegations of unnecessary program duplication. This position, according to respondents, misconstrued the district court findings since it failed to point out that the district court's acknowledged that program existence may be fundamental to institutional integrity even though it duplicates programs elsewhere.[192] Given the facts, the district court concluded that "there is no showing in this case that the elimination of unnecessary programs within the system of higher education in Mississippi would be feasible, educationally reasonable, or would offer any hope of substantial impact on student choice."[193]

B. The Duty Under Title VI to Disestablish is No Greater Than Under the Constitution

Respondents note that it is undisputed that Title VI of the Civil Rights Act of 1964 "proscribes only those racial classifica-

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[189] *Id.* at n.48 and accompanying text.

[190] *Id.*

[191] *Id.* Louisiana's experience irrefutably demonstrates the total fallacy in the assertion that enhancement of the predominantly black institutions offers any hope of a material change in racial composition. Brief Amici Curiae Charles E. "Buddy" Roemer, III, *et al.* at 20-24.

[192] *Respondent's Brief, supra* note 8, at n.50 and accompanying text.

[193] *Ayers I*, 674 F. Supp. at 1561. No party to this litigation seeks the closure of any institution. This fact merely emphasizes how complex this matter is as an educational and political issue "which should be debated in the public domain outside the jurisdiction of 'ill-equipped' courts." *Respondent's Brief, supra* note 8, at n.51.

tions that would violate the Equal Protection Clause or the Fifth Amendment." [194]The legal consequence of this is that without "proof of invidious purpose" there is no "valid Title VI claim."[195] As stated earlier, there exists no such finding in this record. There is no proof of any educationally justified program termination, consolidation or transfer which would materially alter racial identifiability. Likewise, the "record will not permit a conclusion that the State's present use of the ACT or tolerance of duplicative programs is an 'effect' of the separatist policies of that distant era."[196] The United States agreed with the respondents' position that the duty of "full regulatory compliance" established by *Bazemore* controls in the present case.[197] The United States simply contended that "while the adoption of a nondiscriminatory admission policy is sufficient to 'overcome the effects of prior discrimination' in the context of 4-H Clubs, more may be required" here in public higher education.[198] The United States' argument ignores the record and the finding of fact showing that the States' higher education programs do not discriminate.

The private petitioners argued for a far broader application of the regulation than did the United States. This position, likewise, ignored the holding in *Bazemore*. Respondents' countered by stating: "*Bazemore*'s finding of no discrimination in services does not remotely imply that distinctions in resources among universities constitutes 'discrimination' or a remediable 'effect.'"[199]

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[194] *Respondent's Brief, supra* note 8, at n.53 and accompanying text (quoting University of California Regents v. Bakke, 438 U.S. 265, 287 (1978)).

[195] *Id.* (quoting Guardians Ass'n v. Civil Service Comm'n, 463 U.S. 582, 642 (1983) (Stevens, J., dissenting)).

[196] Id. at n.56 and accompanying text.

[197] *Id.*

[198] *Id.*

[199] *Respondent's Brief, supra* note 8, at n.57 and accompanying text.

Therefore the argument of the private petitioners must fail when analyzed in light of the facts in this litigation. The respondents summarized: "what this record reveals as portrayed by the evidence, and confirmed by the district court's extensive findings, is that the State of Mississippi has fulfilled its duty to disestablish under *Bazemore*, *Brown*, *Green*, Title VI, and the Title VI regulation."[200]

William J. Dunaway
Russell W. Mills

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[200] *Id.* at n.58 and accompanying text.

THE QUEST FOR EQUAL EDUCATION IN MISSISSIPPI: THE IMPLICATIONS OF *UNITED STATES v. FORDICE*

Robert N. Davis[*]

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Some protested, to be sure. But no political leader risked all of his power and no sector of the nation's governmental apparatus was fully applied against this grave injustice—until the Supreme Court of the United States took that step. There was irony in this because the nine Justices, as has often been said, constitute the least democratic branch of the national government. Yet this, most likely, was one reason why the Court felt free to act: it is not compelled to nourish the collective biases of the electorate; it may act to curb those unsavory attitudes by the direct expedient of declaring them to be intolerable among civilized people.[**]

I. INTRODUCTION

In the recent decision *United States v. Fordice*,[1] the United States Supreme Court determined that the State of Mississippi

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[**] RICHARD KLUGER, SIMPLE JUSTICE at x (1975).

[1] 112 S. Ct. 2727 (1992). This case was originally titled *Ayers v. Allain*, 674 F. Supp. 1523 (N.D. Miss. 1987). The Supreme Court caption reflects the intervention of the United States and the recent election of Governor Kirk Fordice. Throughout this article I will refer to the whole of the litigation as the *Ayers* or *Fordice* case.

had failed to meet its affirmative obligation to dismantle the prior *de jure* segregated system by adopting race neutral policies that govern its university system.[2] The petitioners, a group of black citizens from Mississippi, argued that the State had not met the *Brown v. Board of Education*[3] mandate to dismantle segregated education with all deliberate speed.[4] The respondents maintained that the State had met the *Brown* mandate by adopting race-neutral policies.[5]

The courts below, the Fifth Circuit Court of Appeals and the United States District Court for the Northern District of Mississippi, applied their interpretation of the standard established in *Brown I* and *II* and concluded that the State had fulfilled its duty to disestablish a segregated school system by adopting race-neutral policies in good faith.[6]

The United States Supreme Court vacated the Fifth Circuit's decision and remanded the case to the court of appeals and the district court with instructions to apply a new appropriate legal standard. This standard queries whether the "[s]tate perpetuates policies and practices traceable to its prior system that continue to have segregative effects."[7]

Part II is an explanation of the recent Supreme Court decision in *Fordice*. Part III discusses the new standard adopted by the Supreme Court for higher education. Part IV analyzes the evidentiary voids that I call "unfinished business" left by the lower courts. Part V is the remedies section in which I urge the State of Mississippi to develop a single university system

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[2] *Id.* at 2732.

[3] 347 U.S. 483 (1954) [*Brown I*], *supplemented*, 349 U.S. 294 (1955) [*Brown II*]; *see* Mark Tushnet & Katya Lezin, *What Really Happened In* Brown v. Board of Education, 91 COLUM. L. REV. 1867 (1991) (insightful discussion of the judicial dynamics involved in this decision). Given the judicial personalities and politics as described in this article, it is not surprising that almost forty years later the debate still ensues over the meaning and application of the *Brown* decision.

[4] *Brown I*, 347 U.S. at 495; *see also* Petitioner's Brief, at 1, U.S. v. Fordice, 112 S. Ct. 2727 (1992) (No. 90-6588) [hereinafter *Petitioners' Brief*].

[5] Respondent's Brief at 3, U.S. v. Fordice, 112 S. Ct. 2727 (1992) (Nos. 90-1205, 90-6588) [hereinafter *Respondent's Brief*].

[6] Ayers v. Allain, 914 F.2d 676 (5th Cir. 1990), *aff'g* Ayers v. Allain, 674 F. Supp. 1523 (N.D. Miss. 1987).

[7] *Fordice*, 112 S. Ct. at 2727, 2730.

that will provide quality education to all Mississippians. Part VI is the conclusion and a call to action by Mississippians to take control of higher education.

II. THE SUPREME COURT DECISION

In the final days of its 1992 term, the Supreme Court, in a flurry of decisions, surprised many court watchers by its eight to one decision in *United States v. Fordice* requiring the State of Mississippi to take more affirmative steps to eliminate its dual educational system.[8] Writing for the majority in the *Fordice* decision is Justice Byron S. White, a seventy-five-year-old 1962 Kennedy appointee. Joining Justice White were the sixty-eight year-old Chief Justice William H. Rehnquist, a 1971 Nixon appointee, eighty-four-year-old Justice Harry A. Blackmun, a 1970 Nixon appointee, seventy-two-year-old Justice John P. Stevens, a 1975 Ford appointee, sixty-two-year-old Justice Sandra D. O'Connor, a 1981 Reagan appointee, fifty-six-year-old Justice Anthony M. Kennedy, a 1987 Reagan appointee, fifty-three-year-old Justice David H. Souter, a 1990 Bush appointee, and forty-four-year-old Justice Clarence Thomas, a 1991 Bush appointee. The lone dissenter was fifty-six-year-old Justice Antonin Scalia, a 1986 Reagan appointee.

Many black citizens of Mississippi heralded the *Fordice* decision as a major victory, even though the decision came from what many people view as "one of the most conservative courts in Supreme Court history."[9] However, in my view, while the decision certainly is a victory in terms of correcting the lower courts' application of the wrong standard, the exact results of the implementation of the Court's decision have yet to unfold.

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[8] *Fordice*, 112 S. Ct. at 2743; *see* Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1 (1979) (analysis of the importance of unanimity in Supreme Court decision making, particularly when it involved racial segregation). In *Fordice*, the near unanimity is critical as the Supreme Court announced a new standard that clarified the full extent of Mississippi's duty to eradicate a racially dual system of higher education. The application of the *Brown* principles in the context of higher education was also confirmed. The near unanimity in *Fordice* is an example of how the unanimity principle helps to legitimize the Supreme Court's rulings. *Id.* at 2 n.5.

[9] Reagan Walker, *Supreme Court's Order: Desegregate*, THE CLARION-LEDGER (Jackson, Miss.), June 27, 1992, at A1.

That implementation will be the result of several factors, including the application of the new standard to the facts found in the district court and the willingness of the State Board of Institutions of Higher Learning and the State Legislature to make major changes to the current educational structure in Mississippi. Moreover, to make equal education in Mississippi a reality, it will take the cooperation and support of every student, faculty member, graduate and employee of all eight public universities.

The *Fordice* decision answered several questions that prior conflicting circuit court decisions did not answer. First, *Fordice* served to clarify the desegregation duty required in the *Brown I* and *II* decisions as applied to higher education. Second, *Fordice* clearly established that merely by adopting race-neutral policies, a state may not meet all of its affirmative obligations under *Brown*. Third, *Fordice* rejected the application of *Bazemore v. Friday*[10] and *Alabama State Teachers Association v. Alabama Public School and College Authority (ASTA)*.[11] Fourth, *Fordice* adopted a standard that seeks to determine whether a state perpetuates policies that are traceable to the state's prior *de jure* system and continue to have a segregative effect.

One of the major weaknesses of the *Fordice* decision is that the Court does not offer specific guidance on how the State should dismantle its dual educational system, leaving the burden of developing a solution to the State and district court. Additionally, the standard that the Court has adopted is very difficult to apply. Nevertheless, the *Fordice* decision is a significant milestone in the development of the law of desegregation in higher education. In my view, what this Supreme Court has done is as significant today as *Brown* was in 1954. The Su-

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[10] 478 U.S. 385 (1986) (holding North Carolina had no duty to prevent operation of racially identifiable 4-H and home economics clubs but did have duty to change salary disparities between blacks and whites which had origins prior to Title VII of the Civil Rights Act of 1964).

[11] 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd per curiam*, 393 U.S. 400 (1969) (holding as long as Alabama deals in good faith with regard to admission, faculty, and staff of higher educational institutions, Alabama has satisfied basic duty of dismantling dual school system).

preme Court has set the tone that will carry education in this country well into the next century.

A. The Origins of a Dual Educational System

The Supreme Court's decision begins with a review of the educational structure in Mississippi from 1848 until the present time.[12] That history reveals the original mission of each of the eight public universities in Mississippi. In 1844 the University of Mississippi, (UM or Ole Miss),[13] was legislatively chartered for white people.[14] The first session began in Oxford in the fall of 1848.[15] From the university's inception, the legislature intended Ole Miss to be a comprehensive school with professional and specialized degree offerings.[16]

The State chartered Alcorn State University (ASU) after the Civil War. The State purchased a former Presbyterian school in the Mississippi Delta, renamed it for the then current Governor James L. Alcorn in 1871, and "designated it . . . as an agricultural college for the education of Mississippi's black youth."[17]

The legislature established Mississippi State University (MSU) in 1878 as an agricultural and mechanical school for white male students only.[18] The university located in Starkville, Mississippi, did not become coeducational until

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[12] *Fordice*, 112 S. Ct. at 2732.

[13] Ole Miss was a name used by the black slaves in Mississippi to refer to the plantation owner's wife. The slaves were not allowed to call the owners by name so "Ole Miss" was a reference to the mistress of the plantation while "Massa" referred to the master. Neil Henry, *Ole Miss: Evolution of Racism's Sound and Fury*, WASH. POST, Oct. 5, 1986, at A1; *see also*, 17 THE WORLD BOOK ENCYCLOPEDIA 502 (1988).

[14] Ayers v. Allain, 674 F. Supp. 1523, 1526-27 (N.D. Miss. 1987).

[15] *Ayers*, 674 F. Supp. at 1526.

[16] *Id.*

[17] *Id.* at 1527; *see* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 96 (1988). The newly freed slaves of the South had, in Eric Foner's words, an "unquenchable thirst for education." When a Mississippi Freedmen's Bureau agent told a group of Freedmen that they were able to pursue an education the newly freed slaves "jumped and shouted in gladness." The interest of the African-American people in improving their conditions has historically been exceptionally strong. *Id.*

[18] *Ayers*, 674 F. Supp. at 1527.

1930.[19]

In 1884, the legislature established Mississippi University for Women (MUW) in Columbus, Mississippi, a few miles east of Starkville.[20] The State established MUW exclusively for the "education of white women in the arts and sciences."[21]

In 1910, the legislature established the University of Southern Mississippi (USM) in Hattiesburg to train white students to become teachers in white public schools.[22] The State granted a charter for Delta State University (DSU) in 1924 in Cleveland, Mississippi.[23] DSU offered a liberal arts program and was not restricted to the education of white people only.[24]

In 1940, the State established Jackson State University (JSU) in the state capitol in order to "train black teachers for black public schools."[25] Soon after, in 1946, the legislature established Mississippi Valley State University (MVSU) located in Itta Bena in order to train black teachers for rural schools.[26]

Thus, in 1954 when the Supreme Court decided *Brown I*[27] Mississippi had operated a dual system of higher education for almost one-hundred years. The Board of Trustees authorized a study on higher education in Mississippi,[28] and acknowledged in the 1954 Brewton Report that there were significant disparities between "educational opportunities provided within the State for negro citizens and those provided for white citi-

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[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.* at 1528.

[23] *Ayers*, 674 F. Supp. at 1528.

[24] *Id.*

[25] *Id.*

[26] *Id.* See app. A for a map of Mississippi universities.

[27] *Brown I* declared that the principle of separate but equal was no longer valid. Separate was inherently unequal, expressly overruling the 1896 holding of Plessy v. Ferguson, 163 U.S. 537 (1896). *Brown I*, 347 U.S. at 494-95.

[28] JOHN E. BREWTON, INSTITUTIONS OF HIGHER LEARNING, HIGHER EDUCATION IN MISSISSIPPI (1954). In November 1953, the Study Committee of the Mississippi Board of Trustees, Institutions of Higher Learning authorized a study of public higher education in Mississippi. The study was developed under the direction of John E. Brewton, Head, Department of English, George Peabody College for Teachers, Nashville, Tennessee.

zens."[29] The Board of Trustees, offering a preview of the reluctance of Mississippi to eliminate the State's dual system, published the Brewton Report shortly after the *Brown I* decision. The Brewton Report recommended that the schools operated for "[n]egro students should be maintained and developed further as a part of the State program to meet anticipated increases in college enrollments."[30] The Report recognized a need for the State to increase the funding level of scholarships to enable Negro students to attend out-of-state graduate and professional schools.[31] While the Report also recommended that the State consider incorporating the historically black institutions (HBIs) with the major comprehensive institutions, there is no evidence to suggest that any incorporation occurred in response to the recommendation.[32]

The Supreme Court concluded that despite the *Brown I* decision, Mississippi continued a policy of *de jure* segregation.[33] The University of Mississippi did not admit a black student until 1962, and then not by choice but by judicial decree.[34] After the University of Mississippi admitted James H. Meredith in 1962, Mississippi State University admitted the

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[29] *Id.* at 41.

[30] *Id.* The Brewton Report's introduction also reveals how comfortable Mississippi was with the current dual system. The introduction to the report states:

> Mississippi has eight publicly supported institutions of higher education, well dispersed throughout the State. For white students, general education is provided at the University of Mississippi, Delta State Teachers College, Mississippi Southern College, Mississippi State College, and Mississippi State College for Women.
>
> . . . . For Negro students, Alcorn A. & M. College provides an agricultural and mechanical program; Jackson College offers liberal arts; and Mississippi Vocational College offers vocational instruction.

Id. at 1.

[31] *Id.* at 42.

[32] *Id.* at 43.

[33] *Fordice*, 112 S. Ct. at 2732.

[34] *Id.* Judge Biggers in the District Court opinion found that the racially dual system continued at least until 1962 despite the *Brown* mandate to desegregate. Ayers v. Allain, 674 F. Supp. 1525, 1529 (N.D. Miss. 1987). It was not until the 1962 decision in Meredith v. Fair, 305 F.2d 341 (5th Cir.), *cert. denied*, 371 U.S. 828 (1962), that the United States Fifth Circuit Court of Appeals required the University of Mississippi to admit a black student named James Meredith.

school's first black student in 1965, Mississippi University for Women in 1966, Delta State University in 1966, and the University of Southern Mississippi in 1967.[35] The black universities enrolled white students in 1966 at Alcorn State, in 1969 at Jackson State, and in 1970 at Mississippi Valley State University.[36]

Faculty employment also paralleled the racial designations of the schools. Historically white institutions (HWIs) did not hire blacks until the 1970-71 academic year.[37] During that academic year, MUW, UM and USM were the first predominately white Mississippi higher education institutions to hire blacks.[38] DSU hired the university's first black in 1973-74, and MSU followed suit in 1974-75.[39] The historically black universities hired whites at ASU in 1966-67, JSU 1967-68, and MVSU in 1968-69.[40]

In 1969, the Office of Civil Rights of the Department of Health Education and Welfare (DHEW), requested that the state submit a desegregation plan to the Department within four months.[41] The Board, five years later in 1974, submitted a plan of compliance.[42] The express purpose of the plan was to improve educational opportunities for minorities at all higher education institutions in the state.[43] The Supreme Court found that DHEW rejected the plan of compliance because it was not sufficient to eliminate the dual educational system in the state.[44] DHEW also rejected a modified plan submitted by the Board because the plan did not address the junior college system. At that time, the Board had no authority over the junior college system but adopted the plan despite DHEW's disapprov-

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[35] *Ayers*, 674 F. Supp. at 1529.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Ayers*, 674 F. Supp. at 1529.
[41] *Id.* at 1530.
[42] *Id.*
[43] State of Mississippi Plan of Compliance to Title VI of the Civil Rights Act of 1964, February 8, 1974.
[44] *Fordice*, 112 S. Ct. at 2733.

al.[45] The *Ayers* lawsuit was filed shortly after DHEW rejected the plan of compliance.[46]

B. Voluntary Dismantlement

The plaintiffs, black students in Mississippi, filed the lawsuit in 1975 alleging that the State maintained a dual system of higher education that continued to have segregative effects.[47] Thus, the plaintiffs argued Mississippi's higher education system violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.[48] The State responded that full compliance with the Fourteenth Amendment and Title VI was achieved by adopting race-neutral policies.[49] Both parties to this litigation engaged in negotiations in an attempt to "voluntarily dismantle"[50] the State's dual educational system, but as the Supreme Court noted: "[b]y the mid-1980's, 30 years after *Brown*, more than ninety-nine percent of Mississippi's white students were enrolled" in HWIs and "[s]eventy-one percent of the State's black students attended" HBIs.[51]

Voluntary dismantlement became an impossibility by 1987 because there was no agreement by the parties on "whether the State had taken the requisite affirmative steps to dismantle its prior *de jure* segregated system."[52] In my view, the institutional mission statements established during the segregated system contributed to the impasse.

Given the role of each of the institutions in the State prior to 1954, it is not difficult to conclude as the Supreme Court did, that the mission assignments and designations continue to perpetuate a racially unequal educational system.[53] The State

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[45] *Ayers*, 674 F. Supp. at 1530.

[46] *Id.*

[47] *Fordice*, 112 S. Ct. at 2733; *see infra* notes 63 and 491.

[48] *Id.* Title VI of the 1964 Civil Rights Act is codified at 42 U.S.C. § 2000(d) (1988).

[49] *Petitioners' Brief*, *supra* note 4.

[50] *Fordice*, 112 S. Ct. at 2733.

[51] *Id.* at 2734. See app. B for a county by county breakdown of racial population in Mississippi.

[52] *Fordice*, 112 S. Ct. at 2733.

[53] *Id.* at 2739.

created this dual system when the schools were initially chartered. Even though the district court found that the State assigned institutional missions based on limited financial resources, one cannot ignore the historical limitations under which the HBIs originally developed.[54] Thus, in my view, logic demonstrates that mission designations tied to limited roles of the past would continue to be problematic in terms of resource distribution.

The mission statements adopted in November 1981 had a general purpose of providing "appropriate differential roles of various state universities. The general objective shall be quality performance of assigned and approved program endeavors."[55] The Board designated MSU, UM and USM as "[c]omprehensive" institutions.[56] This designation meant that these institutions were to offer "a number of programs on the doctoral level."[57] The comprehensive designation also meant that these universities would "be expected to provide leadership in the state in certain disciplines."[58] The mission statements designated JSU as the only "urban" university[59] which focused on providing service to the urban community, and this mission required less program offerings than the comprehensive institutions.[60] The mission statements designated MUW, ASU, DSU and MVSU as "regional" institutions.[61] The regional institutions focused on limited undergraduate degree offerings.[62] This led to the racial disparities between the student bodies and faculty at each of the State's eight public universities.[63]

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[54] *Ayers*, 674 F. Supp. at 1539.

[55] BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING, MISSION STATEMENTS, 1 app. A (Nov. 19, 1981) [hereinafter MISSION STATEMENTS].

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.* at 2.

[60] MISSION STATEMENTS, *supra* note 55, at 2.

[61] *Id.* at 3.

[62] *Id.*

[63] John D. Johnson, *Black, White Enrollment at Mississippi Universities*, THE CLARION-LEDGER (Jackson, Miss.), July 27, 1992, at 10A. Undergraduate enrollment at Mississippi universities for Fall 1991 was:

C. *The District Court and Fifth Circuit Court of Appeals Decisions*

The Supreme Court reviewed the findings of fact and conclusions of law of the district court. The Court also reviewed the legal standard applied by both the district court and the Fifth Circuit Court of Appeals and concluded that the lower courts applied an incorrect standard.[64] Evidence submitted at the district court culminated in 56,700 pages of exhibits.[65] The exhibits included documentary and testimonial evidence regarding "admissions standards, faculty and administrative staff recruitment, program duplication, on-campus discrimination, institutional funding disparities and satellite campuses."[66]

The petitioner maintained that the State "continued to reinforce historic, race-based distinctions among the universities."[67] The respondents argued that the State had met its duty to "disestablish its state-imposed segregative system by implementing and maintaining good-faith, nondiscriminatory race-neutral policies and practices in student admission, faculty hiring, and operations."[68] The district court made extensive factual findings which the Fifth Circuit Court of Appeals did not disturb.[69]

	HBI	
	Black	White
Alcorn State University (ASU)	2,927	112
Jackson State University (JSU)	5,557	82
Mississippi Valley State Univ. (MVSU)	2,045	5
	HWI	
	Black	White
University of Mississippi (UM)	675	7,785
University of Southern Miss. (USM)	1,686	8,525
Mississippi State University (MSU)	1,536	9,447
Mississippi University for Women (MUW)	439	1,887
Delta State University (DSU)	730	2,675

Id.

[64] *Fordice*, 112 S. Ct. at 2734-35.

[65] *Id.* at 2734.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Fordice*, 112 S. Ct. at 2735.

The district court based its legal conclusions on an overview of the proposition that "[w]here a state has previously maintained a racially dual system of public education established by law, it assumes an affirmative duty to reform those policies and practices which required or contributed to the separation of the races."[70] The district court concluded that for "elementary and secondary education level[s] the courts have defined the affirmative duty to include also the elimination of all 'vestiges' or effects of the former *de jure* segregated system."[71] However, the district court raised a question regarding the scope of the affirmative duty in higher education as compared to elementary and secondary education.[72] The district court concluded that in higher education, the affirmative duty to desegregate is met when an institution adopts good-faith, race-neutral policies.[73]

The Supreme Court noted that the district court, after applying this standard to the facts, concluded that there was no constitutional or statutory violation and that the State was fulfilling its "affirmative duty to disestablish the former *de jure* segregated system of higher education."[74] The Fifth Circuit Court of Appeals applied the same standard and affirmed the

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[70] *Fordice*, 112 S. Ct. at 2735; *see* Milliken v. Bradley, 433 U.S. 267, 290 (1977) (*Milliken II*) (regarding remedial powers of federal district courts in Detroit, Michigan public school desegregation cases). This case involved the appropriateness of a district court order to include, as part of a desegregation plan, compensatory or remedial educational programs funded by the officials responsible for the constitutional violation. *Id.* In Milliken v. Bradley, 418 U.S. 717 (1974) (*Milliken I*), the Supreme Court held that an interdistrict remedy was not called for because the constitutional violation was limited to the Detroit city schools. *Id.*; *see also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (approving a variety of district court remedial measures to address a dual education system), *reh'g denied*, 403 U.S. 912 (1971).

[71] *Ayers*, 674 F. Supp. at 1551; *see* Green v. County Sch. Bd., 391 U.S. 430 (1968) (involving a freedom of choice plan in Virginia public schools that was not working). The Court said the school district was required to do more than simply offer a freedom of choice plan if desegregation was not being achieved. *Id.* at 438.

[72] *Fordice*, 112 S. Ct. at 2734.

[73] *Id.* at 2735; *see* Comment, *Integrating Higher Education: Defining the Scope of the Affirmative Duty to Integrate*, 57 IOWA L. REV. 898 (1972) (excellent review of older cases and uncertainty created by those decisions; the author concludes *Brown*, *Green*, and *Swann* would apply to higher education).

[74] *Fordice*, 112 S. Ct. at 2735.

district court decision.[75]

III. A NEW STANDARD

The Supreme Court addressed two major questions in the *Fordice* decision.[76] First, the Court articulated the appropriate standard to apply in deciding whether Mississippi had fulfilled its obligation to dismantle its prior *de jure* segregated system of higher education.[77] Second, after determining the appropriate standard, the Court applied this standard to determine whether Mississippi had in fact fulfilled its "affirmative duty to dismantle its prior dual university system."[78] The Supreme Court initiated its discussion about the appropriate standard by noting that "[o]ur decisions establish that a State does not discharge its constitutional obligations until it eradicates policies and practices traceable to its prior *de jure* dual system that continue to foster segregation. Thus, we have consistently asked whether existing racial identifiability is attributable to the State."[79] The Court cited seven cases to support this theme. A 1968 decision, *Green v. County School Board*,[80] involved the effectiveness of a freedom of choice plan in a Virginia school district. The Court said if an adopted plan fails to

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[75] *Id.*

[76] The importance of this decision and its application to higher education cannot be overstated. Alexander Bickel commented on the importance of the "segregation cases" of the 1950's by saying:

> [T]he Court knew of course that its judgment would have an unparalleled impact on the daily lives of a very substantial portion of the population, and that the response of many of those affected would be in varying degrees hostile. It was necessary, therefore, if ever it had been, to exert to the utmost the prestige, the oracular authority of the institution. To this end it was desirable that the Court speak unanimously, with one voice from the deep. And the less said, the less chance of internal disagreement.

Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 2 (1955). Similarly, the *Fordice* decision will affect several southern states and a few northern states that continue to maintain dual school systems, such as Tennessee, Louisiana, Texas, Virginia, Alabama, Florida, and Pennsylvania.

[77] *Fordice*, 112 S. Ct. at 2732.

[78] *Id.* at 2735.

[79] *Id.*

[80] 391 U.S. 430 (1968).

accomplish meaningful desegregation then something more should be done.[81] A 1971 decision, *Swann v. Charlotte-Mecklenburg Board of Education*[82] involved a North Carolina public school board that developed inadequate remedies to desegregate its dual system. The district court developed extensive remedial plans and the Supreme Court held that those plans were within the broad equitable powers of the court.[83] The 1976 decision of *Pasadena City Board of Education v. Spangler*[84] restricted the district court remedies to the extent that the court attempted to mandate a particular racial balance. The approach of requiring a particular degree of racial balancing or mixtures was expressly disapproved in *Swann*.[85] In *Gilmore v. City of Montgomery*,[86] black citizens in Montgomery, Alabama filed a motion for supplemental relief seeking an injunction against racially segregated private groups and clubs from using city recreational facilities. The Court sustained the injunction to the extent that the city permitted exclusive use by these organizations. In the 1986 decision of *Bazemore*, the Supreme Court held that salary disparities between black and white personnel at the North Carolina Extension Service had to be eradicated in order to comply with its affirmative obligation to desegregate a prior *de jure* system.[87] The recent decision of *Board of Education v. Dowell*[88] in 1991 ordered a district court to vacate a prior injunction and return the school district to local control after the school board had demonstrated good faith efforts to desegregate, accomplishing a unitary school district. In 1992, the Supreme Court held in *Freeman v. Pitts*[89] that a district court may relinquish the supervision of a school district in incremental stages until full compliance with all of the *Green* factors were achieved.

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[81] *Green*, 391 U.S at 438-42.
[82] 402 U.S. 1 (1971).
[83] *Swann*, 402 U.S. at 15-18.
[84] 427 U.S. 424 (1976).
[85] *Swann*, 402 U.S. at 24.
[86] 417 U.S. 556 (1974).
[87] *Bazemore*, 478 U.S. at 487-88.
[88] 498 U.S. 237 (1991).
[89] 112 S. Ct. 1430 (1992).

This theme was considerably different from the Fifth Circuit Court of Appeals decision in *Ayers* that the State had met its affirmative duty to disestablish a dual educational system by adopting and implementing race-neutral policies to govern the higher education system. The Fifth Circuit concluded that students in the higher education arena, in contrast to those in elementary and secondary schools, have "real freedom" to choose where they will attend school.[90]

The Supreme Court agreed that there were major differences between higher education and elementary and secondary schools, but it did not agree that the constitutional duty to desegregate was different. The court reasoned that attendance at universities is a matter of choice.[91] The State does not assign students to the universities.[92] Moreover, the "remedies common to public school desegregation, such as pupil assignments, busing, attendance quotas, and zoning, are unavailable when persons may freely choose whether to pursue an advanced education and, when the choice is made, which of several universities to attend."[93]

The matter of choice discussion, however, was virtually the only part of the Fifth Circuit's opinion with which the Supreme Court agreed. Significantly, the Supreme Court did not agree with either the appeals court or the district court's holding that the adoption of race-neutral policies alone "demonstrate[s] that the State has completely abandoned its prior dual system."[94] The Supreme Court focused on the variety of factors that may influence a student's choice. The Court said admissions policies or faculty hiring policies do not solely determine student atten-

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[90] *Fordice*, 112 S. Ct. at 2736.

[91] *Id.*

[92] *Id.*

[93] *Id.*; *cf.* David E. Kendall, Note, *The Affirmative Duty to Integrate in Higher Education*, 79 YALE L.J. 666 (1970). The note raises the question of whether the Supreme Court's decision in Green v. County School Board, 391 U.S. 430 (1968), had an application to higher education. The author concluded that it should be applied to higher education because it will produce "more total integration." Moreover, the note described Southern higher education in 1970 as racially identifiable and supporting inferior African-American colleges. *Id.* Twenty years later, the description is still very appropriate.

[94] *Id.*

dance.[95] Moreover, the question of choice has little to do with whether or not race-neutral policies operate to cure a constitutionally invalid system.[96] The differences between the remedies available to elementary and secondary institutions as compared to institutions of higher education are indeed significant. However, it is constitutionally inconsistent to contend that the element of choice requires a different constitutional standard to determine whether the *Brown* mandate to remove all vestiges of prior segregated systems is being achieved.

The Supreme Court emphasized that even if segregative policies are repealed, "there may still be state action that is traceable to the State's prior *de jure* segregation and that continues to foster segregation."[97] If such policies still exist, they must be eradicated "to the extent practicable and consistent with sound educational practices."[98]

A. Bazemore Distinguished

Both lower courts recognized some debate regarding the appropriate standard to apply. The debate resulted because the Supreme Court had previously adopted several standards from which courts could choose. This lack of clarity regarding which standards were appropriate in the higher education context caused problems.

At the district court, Judge Biggers noted that the courts had applied an affirmative duty in both the elementary and secondary levels as well as the higher education context, but there was "substantial disagreement on the question of whether the scope of the duty is as broad in the higher education context as has been defined and applied in the elementary and secondary education context."[99] In the district court's view, some courts had applied the Supreme Court standard articulated in *Green*. In *Green*, the Supreme Court held that a freedom of choice plan was not working and required the school board to

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[95] *Fordice*, 112 S. Ct. at 2736.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] Ayers v. Allain, 674 F. Supp. 1523, 1552 (N.D. Miss. 1987).

"take whatever action may be necessary to create a unitary, non-racial system."[100]

Green arose in the context of a racially segregated school system in New Kent County, a rural county in Eastern Virginia.[101] The county population numbered approximately 4,500 with fifty percent black and fifty percent white.[102] All of the residents reside throughout the county with no noticeable residential segregation.[103] There were two schools in the county, New Kent which is a combined elementary and high school for whites, and George W. Watkins, a combined elementary and high school for blacks.[104] Approximately 1300 children attend county schools and of this total, 740 were black and 550 were white.[105] These public schools were the product of Virginia law that required racial segregation.[106] Even after the United States Supreme Court decisions in *Brown I* and *II*, Virginia passed laws in direct defiance of the *Brown* decisions.[107] One of those laws provided for the automatic reassignment of pupils each year unless they applied to be assigned to another school.[108] Under the Virginia Pupil Placement Act,[109] neither blacks nor whites sought to change their previous attendance patterns.[110] Suit was brought in 1965 seeking to enjoin the School Board from maintaining the segregated school system.[111] The School Board adopted a "freedom of choice" plan for desegregating the school system five months after the suit began in order to remain eligible for federal financial assis-

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[100] Green v. County School Bd., 391 U.S. 430, 440 (1968) (quoting Bowman v. County School Bd., 382 F.2d 326, 333 (4th Cir. 1967) (Sobeloff, J., concurring opinion)).

[101] *Id.* at 432.

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Green*, 391 U.S. at 432.

[106] *Id.*

[107] *Id.* at 432-33.

[108] *Id.* at 433.

[109] VA. CODE § 22-232.1 *et seq.* (1964). This Act placed authority in a State Public Placement Board to assign children to particular schools. *Id.* The Act was repealed in 1966. *Green*, 391 U.S. at 433.

[110] *Green*, 391 U.S. at 431.

[111] *Id.*

tance.[112] The freedom of choice plan allowed students to choose annually between New Kent and Watkins.[113] Students entering the first and eighth grades were required to affirmatively express a choice. All students who did not express a preference would be assigned to the school previously attended.[114] The plan was filed with the district court but the court denied the petitioner's prayer for injunctive relief.[115] The Fourth Circuit Court of Appeals affirmed the district court's approval of the plan but remanded to address additional issues such as faculty integration.[116]

The Supreme Court in *Green* granted certiorari, and noted that the racially identifiable dual system of education in New Kent County was "precisely the pattern of segregation to which *Brown I* and *II* were particularly addressed."[117] In *Green*, the Supreme Court concluded that the focus of *Brown II* was to allow blacks to integrate white schools.[118] But this was only "the first step."[119] The ultimate goal was the "transition to a system of public education freed of racial discrimination."[120]

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[112] *Id.* at 433.

[113] *Id.* at 434.

[114] *Green*, 391 U.S. at 434. This plan basically only required first graders and eighth-graders to expressly make a choice regarding which school to attend. All other students were not required to make a choice at all. Their failure to articulate an express choice would simply result in a reassignment to the previous school attended. *Id.*

[115] *Id.* at 434.

[116] *Id.* at 434-35. Two judges while agreeing with the remand to consider faculty integration, thought that the district court should establish "procedures for periodically evaluating the effectiveness of the [Board's] freedom of choice[plan]." *Id.* at 435.

[117] *Green*, 391 U.S. at 434.

[118] *Id.* at 436.

[119] *Id.*

[120] *Id.* The Court held:

> In the context of the state imposed segregated pattern of long standing, the fact that in 1965 the Board opened the doors of the former "white" school to Negro children and of the "Negro" school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system. *Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nev-

Thus, the Court required school boards to "come forward with a plan that promises realistically to work, and promises realistically to work now."[121] The Court noted that "freedom of choice is not an end in itself."[122] Quoting Judge Sobeloff in *Bowman v. County School Board*,[123] the Court said:

> "[F]reedom of choice" is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable , but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a unitary, non-racial system.[124]

Thus, the Court, viewing the effects of the freedom of choice plan, concluded that it did not "effectuate a transition to a unitary system."[125] Therefore, the Court required that the school board develop a plan that would "promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools."[126]

Other courts relied on *ASTA*,[127] which stated that the duty to dismantle racially dual systems of education was different in the elementary-secondary school context from the higher education context.[128] *ASTA* involved the construction of a branch center of Auburn University in Montgomery, Alabama near Alabama State, a historically black teachers college.[129]

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ertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.

Id. at 437-38.

[121] *Id.* at 439.

[122] *Green*, 391 U.S. at 440.

[123] 382 F.2d 326 (4th Cir. 1967).

[124] *Bowman*, 382 F.2d at 333.

[125] *Green*, 391 U.S. at 441.

[126] *Id.* at 442.

[127] 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd*, 393 U.S. 400 (1969) (per curiam); *see* Comment, *Integrating Higher Education: Defining the Scope of the Affirmative Duty to Integrate*, 57 IOWA L. REV. 898, 908 (1972) (thorough criticism of *ASTA* decision).

[128] *ASTA*, 289 F. Supp. at 787-88.

[129] *Id.* at 786.

The Alabama State Teachers Association, plaintiff in the case, represented approximately 10,000 teachers.[130] The Association's concern was that the new center would further perpetuate an already dual system of education in Alabama.[131]

District court Judge Frank M. Johnson, Jr.,[132] writing for a unanimous three judge panel found that the plaintiffs' concerns, that the new Auburn branch would become identifiably white, were speculative.[133] The court said that the record did not demonstrate that blacks wishing to attend the new center would be denied admission.[134] Thus, under the particular facts in *ASTA*, the district court concluded that "as long as the State and a particular institution are dealing with admissions, faculty and staff in good faith the basic requirement of the affirmative duty to dismantle the dual school system on the college level, to the extent that the system may be based upon racial

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[130] *Id.*

[131] *Id.* at 789. This concern is identical to that expressed by the plaintiffs in *Ayers*. In *Ayers*, the plaintiffs argued that these centers competed with the HBIs and discouraged local area whites from enrolling in the nearby black schools. *Ayers*, 674 F. Supp. at 1541-43.

[132] Judge Johnson was appointed to the United States District Court for the Middle District of Alabama by President Eisenhower in 1955. He was the youngest federal judge in the country and quickly gained a reputation as one of the few southern judges who would fight against racial injustice. *See* JACK BASS, TAMING THE STORM 87 (1993). However, the *ASTA* decision probably revealed Judge Johnson's optimism about race relations in higher education.

[133] *ASTA*, 289 F. Supp. at 789; *see* Geier v. Alexander, 801 F.2d 799 (6th Cir. 1986). In *Geier*, the Sixth Circuit approved a consent decree which contained several affirmative action provisions between Tennessee State (TN) and the University of Tennessee at Nashville (UT-N). UT-N had established a branch campus in Nashville originally with the understanding that it would not convert the Nashville center into a degree granting institution. Tennessee State alleged that establishing the center in Nashville would affect its efforts to desegregate its predominately black student body and faculty. The district court originally denied the plaintiff's request for an injunction much like *ASTA*. However, ultimately UT-N became a degree granting institution which exacerbated TSU's problems. Thus, the court ordered the merger of TSU and UT-N and imposed quotas on student recruitment. *ASTA* 289 F. Supp. at 800-02; *cf.* Norris v. State Council of Higher Educ. for Virginia, 327 F. Supp. 1368 (E.D. Va. 1971) (district court held that escalation of 2 year college to 4 year college in same area where Virginia State University is located served to perpetuate dual educational system and granted plaintiffs' request for an injunction).

[134] *Id.* at 789.

consideration, is satisfied."[135] The court then distinguished elementary and secondary public schools from institutions of higher learning.[136]

Thus, the court permitted the construction of the new center.[137] The court interpreted the scope of the state's duty to desegregate as narrow. Because students have a choice in the college context, the court stated a "good faith" standard was all that was necessary.[138]

Thus, reviewing these cases, the district court in *Ayers* concluded that there were "qualitative differences existing between elementary-secondary schools and institutions of higher learning."[139] The critical difference for Judge Biggers was the authority of local school boards to control attendance patterns at certain schools.[140] In contrast, higher education is not compulsory and attendance patterns are based on free choice.[141] Thus, the district court relied on *ASTA* and applied a more limited duty to dismantle a dual higher education system than that duty called for in *Green*. Under the *ASTA* standard, the "state's affirmative duty is satisfied by the good faith adoption of race-neutral policies and procedures."[142]

The district court said that the *ASTA* distinction between higher and elementary-secondary education was reiterated in

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[135] *Id.* at 789-90.

[136] *Id.* at 790. Judge Johnson said:

> We are also cognizant that recent Supreme Court decisions have cast doubt on the continued viability of freedom of choice in the public schools. But we do not interpret those decisions as applying to the operation of an education system on a college level. Freedom to choose where one will attend college, unlike choosing one's elementary or secondary public school, has a long tradition and helps to perform an important function, viz., fitting the right school to the right student.

Id.

[137] *ASTA*, 289 F. Supp. at 790.

[138] *Id.* at 789. This is an interesting conclusion because neither *Brown* nor *Green* make such a distinction. Both decisions speak in terms of public education; *see* Kendall, Note, *supra* note 93 (stated that neither *Brown* or cases following it specifically exempted higher education from requirements imposed in lower education).

[139] *Ayers*, 674 F. Supp. at 1552.

[140] *Id.*

[141] *Id.* at 1553.

[142] *Id.* at 1552.

Bazemore, which involved 4-H and Homemaker clubs of the North Carolina Agricultural Extension Service, a division of the North Carolina State University School of Agriculture. In *Bazemore*, the Supreme Court confronted disparities in salary levels between black and white personnel that remained after 1965 when the Extension Service had merged. Prior to 1965, the Extension Service maintained a "white branch" and a "Negro branch."[143] The Supreme Court, in a *per curiam* opinion, ruled that the Fourth Circuit erred in holding there was no duty to eradicate salary disparities.[144]

However, the Supreme Court held that there was no Fourteenth Amendment violation with respect to the 4-H and Homemaker Clubs because from 1965 forward, the Extension Service maintained open door policies for club membership.[145] The *Bazemore* Court said that *Green* had no application in the "wholly different milieu" of higher education.[146] Thus, the district court read *Green*, *Bazemore,* and *ASTA* to mean that the "scope of the affirmative duty to disestablish a former *de jure* segregated system of education is to be defined in accordance with the degree of choice individuals enjoy as to whether they wish to attend college at all and, if so, which one."[147] The district court said:

> [W]here choice is traditionally controlled by the state, in elementary and secondary education, the state is required to exercise its control in a way which maximizes the racial integration of component institutions . . . . The question of whether the state has fulfilled its affirmative duty in the elementary and secondary sphere is determined by assessing the results of state policy, that is, whether the policies implemented in fulfillment of the affirmative duty have substantially affected the racial mix of the schools involved. The overwhelming emphasis on the results of official policy in this

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[143] *Bazemore*, 478 U.S. at 390. The State merged the two branches into one Extension Service in response to the passage of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e). *Id.* at 390-91.

[144] *Id.* at 386-87.

[145] *Id.* at 407.

[146] *Id.* at 408.

[147] *Ayers*, 674 F. Supp. at 1553.

> context is appropriate since direct official control over attendance decisions can be expected to produce an immediate tangible impact on racial attendance patterns. In the college and university education context, however, where individuals have traditionally enjoyed free choice as to whether and when to attend school, the courts have considered it inappropriate to require state officials to maximize integration when assessing official action vis-a-vis the affirmative duty to disestablish a former *de jure* segregated system.[148]

This analytical approach misses an important issue.[149]

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[148] *Id.* at 1553-54. Judge Biggers' district court opinion detailed what he saw as the qualitative differences between elementary-secondary and higher education. He said:

> Elementary and secondary schools in a single district tend to be fungible in the sense that they generally strive towards uniformity in offerings, facilities and services. The opposite is true in higher education. A special emphasis is placed upon the relative uniqueness of the separate institutions comprising a public system of higher education. Indeed, the uniqueness of institutions which results from the confluence of course offerings, services, size, location, faculty and students found at each institution, explains why freedom of choice is so valued and why the courts have not required the restriction of student choice in higher education. Thus, given that the state is not obligated to control student choice in fulfilling its duty to disestablish a former *de jure* segregated system of higher education, it would be inappropriate to emphasize the relative degree of integration of each institution in determining whether the state has satisfied its duty.

Id. at 1554. While this distinction is fair to make, the district court misconstrued the issue to be one of controlling student choice in fulfilling its duty to disestablish a segregated system. The problem lies not with student choice but with institutional policies improperly influencing that choice.

[149] The important issue is the impact of a past dual system on the present structure; *see* Kendall, Note, *supra* note 93, at 679, 685-86 (stressing impact of past dual system on present structure). There the student author demonstrates foresight and vision by writing the following twenty-two years ago:

> The Southern colleges which are predominately black today were funded by the States for Negroes only; although the laws enforcing segregation at these institutions were declared unconstitutional sixteen years ago, the state is as responsible in higher education as in elementary/secondary education for the attendance patterns originally established by de jure segregation which now condition student choice of institutions of higher education. The continued existence of such patterns indicates that *de jure* segregation has not been disestablished; the national commitment to extirpating such segregation, declared in *Brown*, is being dis-

The district court assumes that free choice exists because the State has adopted race-neutral policies. The Supreme Court stated that the mere existence of race-neutral policies does not cure the constitutional violation created by a dual educational system.[150]

The district court's opinion concludes with a flair. The court acknowledges that faculty hiring patterns and student enrollment should be examined, but says the focus should be on insuring that state higher education policies and practices are race-neutral and do not perpetuate racial identifiability of institutions.[151] Judge Biggers ignores the impact that historical structure of the institutional systems have on students' free choice. Choice is not free simply because the school board adopted a race-neutral policy ten years ago, when that educational system existed for more than one-hundred years. Patterns were established and systems are in place based on a long history of state sanctioned segregation. Judge Biggers misses a critical element when determining that students in

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> honored and disobeyed . . . .The fact that a stricter requirement than the "all deliberate speed" of the contemporaneous elementary/secondary education cases was enforced in an area of admissions in higher education seems to raise the inference that if affirmative action to encourage integration is required in elementary/secondary education, something more than racially non-discriminatory admissions policies will be required in higher education.

Id. at 679-80.

[150] *Fordice*, 112 S. Ct. at 2736. Moreover, to the extent that the district court equates free choice with race neutral policies, it falls into the trap of attempting to identify racial consequences through traditional notions of intent. This approach ignores the fact that racial matters are frequently influenced by more subtle factors. *Id.; see* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987). Professor Lawrence said:

> In short, requiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent ignores much of what we understand about how the human mind works. It also disregards both the irrationality of racism and the profound effect that the history of American race relations has had on the individual and collective unconsciousness.

Id. at 323. Of course, in *Ayers* the basis for the dual school system was very clearly the racist policies which have a more subtle impact that continues beyond the period during which these policies received express governmental approval.

[151] *Ayers*, 674 F. Supp. at 1554.

Mississippi have exercised free choice.

The district court relied on *Bazemore* to support the application of its narrow good faith standard.[152] The purpose of the 4-H and Homemaker clubs in *Bazemore* was to foster the spread of information regarding agriculture and home economics.[153] After the passage of the Civil Rights Act of 1964,[154] the practice of *de jure* discrimination ceased but, the clubs remained racially identifiable.[155] The five-to-four *Bazemore* Court concluded that no evidence of discrimination in membership existed after 1965.[156] The Court held that because the extension service had discontinued its prior *de jure* practices and adopted neutral admissions policies, it satisfied the Fourteenth Amendment obligations.[157] Although *Green* held that voluntary choice programs were not adequate in the public schools, the *Bazemore* Court stated that this rationale does not apply to

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[152] *Id.*

[153] *Bazemore*, 478 U.S. at 388-89.

[154] 42 U.S.C. § 2000e (1988).

[155] *Bazemore*, 478 U.S. at 407.

[156] *Id.*

[157] *Id.* at 408. *Bazemore* was a *per curiam* opinion with a concurrence in part written by Justice Brennan and joined by the Chief Justice Burger, Justices White, Powell, Rehnquist and O'Connor. *Id.* at 407. The concurrences by these justices involved the issue of the disparate salaries between black and white employees of the Extension Service. *Id.* at 386-87. These justices determined that the district court and the court of appeals had erred in its determination that the Extension Service had no duty to "eradicate salary disparities between white and black workers that had their origin prior to the date Title VII [of the Civil Rights Act of 1964] was made applicable to public employers." *Id.* at 387. Moreover, by a bare five to four majority the Court concluded that the Extension Service met its legal obligations with respect to the 4-H and Homemaker clubs. *Id.* at 409. Justices Brennan, Marshall, Blackmun and Stevens dissented with the majority regarding the scope of the duty owed by the Extension Service to disestablish segregation. *Id.* at 409. These justices thought the petitioners were correct with respect to their claim under Title VI of the Civil Rights Act of 1964, as well as the Fourteenth Amendment claim. *Id.* at 412. Indeed, the dissenters said:

> It is absurd to contend that the requirement that States take 'affirmative action' is satisfied when the Extension Service simply declares a neutral admissions policy and refrains from illegal segregative activities. Moreover, the Court simply ignores the portion of the regulation that plainly requires that affirmative action be taken to overcome the effects of prior discrimination.

Bazemore, 478 U.S. at 414 (Brennan, J., dissenting).

voluntary clubs.[158] The *Bazemore* majority reiterated that the missing element was compulsion.[159] There was no compulsion to join the Extension Services clubs.[160] Thus, the *Bazemore* Court distinguished *Green* as not being applicable to "this wholly different milieu."[161]

The Supreme Court in *Fordice* disagreed with the State's argument that the district court and court of appeals properly followed *Bazemore*.[162] The Court distinguished *Bazemore* from *Ayers* by citing the district court's factual findings in *Bazemore*. In *Bazemore* the district court found that the Extension Service had completely abandoned its prior policy of segregation.[163] The Court found that there was no "evidence of any lingering discrimination in either services or membership."[164] In contrast, the *Fordice* Court found substantial effects of *de jure* segregation, with only limited State efforts to remedy the past effects of this segregation.[165] Additionally, the Court concluded that "any racial imbalance resulted from the wholly voluntary and unfettered choice of private individuals."[166] In *Bazemore*, the Supreme Court's analysis determined the *Green* standard to be inapplicable only after the Court was convinced that the State had not played a part in perpetuating the racial identifiability of the clubs.

Bazemore and *Ayers* stand apart on the specific issue of State responsibility for racial identifiability, due to factual dissimilarities. The Supreme Court distinguished *Bazemore*, noting that inquiry must be made to determine whether Mississippi had perpetuated a dual educational system.[167]

With that introduction the Supreme Court announced a bold new standard which it claimed had been used as a guide-

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[158] *Id.* at 408.
[159] *Id.*
[160] *Bazemore*, 478 U.S. at 408.
[161] *Id.*
[162] *Fordice*, 112 S. Ct. at 2737.
[163] *Id.*
[164] *Id.* (citing *Bazemore*, 478 U.S. at 407 (White, J., concurring)).
[165] *Id.* at 2732-34.
[166] *Fordice*, 112 S. Ct. at 2737.
[167] *Id.*

post all along. In the context of higher education, the State's duty to disestablish a prior *de jure* segregated system is determined by the following inquiry:

> [I]f the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects-whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system-and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system.[168]

Segregation and discriminatory policies that violate the Equal Protection Clause of the Fourteenth Amendment may still exist even after the removal of a *de jure* segregated system.[169] Thus, the Supreme Court held that the Fifth Circuit and the district court erred when they concluded that the State's higher educational system complied with the Equal Protection Clause.[170]

The Supreme Court held that application of the proper legal standard by the lower courts would have revealed "several surviving aspects of Mississippi's prior dual system which are constitutionally suspect; for even though such policies may be race-neutral on their face, they substantially restrict a person's choice of which institution to enter and they contribute to the racial identifiability of the eight public universities."[171] The Supreme Court commanded that "Mississippi must justify these policies or eliminate them."[172]

The Supreme Court did not attempt to identify an exhaustive list of the "remnants of Mississippi's prior *de jure* system,"[173] but focused instead on the four policies that perpetuated its segregative effects.[174] The Supreme Court highlighted

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[168] *Id.* at 2737.
[169] *Id.*
[170] *Id.*
[171] *Fordice*, 112 S. Ct. at 2738.
[172] *Id.*
[173] *Id.*
[174] *Id.*

admission standards, program duplication, institutional mission assignments and continued operation of all eight public universities as policies which reflected continued segregation.[175]

In the district court, the plaintiffs argued the inequities between the HBIs and HWIs by using comparative statistics in nine categories, including use of the American College Test (ACT), student recruitment and retention, admissions policies, assignment of institutional missions, program duplication, facilities, financing, land grant activities and faculty and staff employment.[176]

B. Four Current Policies Traceable to a de jure System

The Supreme Court was very careful to say that the other policies and areas of controversy may reflect unconstitutional remnants of a prior system, but that it was expressly addressing the four areas that were readily apparent from the district court's findings.[177]

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[175] *Id.*

[176] *Ayers*, 674 F. Supp. at 1554-63.

[177] *Fordice*, 112 S. Ct. at 2738. The Court specifically said:

> It is important to state at the outset that we made no effort to identify an exclusive list of unconstitutional remnants of Mississippi's prior de jure system. In highlighting, as we do below, certain remnants of the prior system that are readily apparent from the findings of fact made by the District Court and affirmed by the Court of Appeals, we by no means suggest that the Court of Appeals need not examine, in light of the proper standard, each of the other policies now governing the State's university system that have been challenged or that are challenged on remand in light of the standard that we articulate today. With this caveat in mind, we address four polices of the present system: admissions standards, program duplication, institutional mission assignments, and continued operation of all eight public universities.

Id.

This simple language has proven to be a field of land mines for the litigants. One of the major problems was the inability of the plaintiffs and defendants to agree on which areas were appropriate to structure settlement discussions. At hearings before Judge Biggers on October 22, 1992, the plaintiffs' position was that all subjects were open. The defendants wanted to limit discussions to the four areas highlighted by the Supreme Court; *see infra* notes 309 and 311. *See also Transcript of Proceedings before Judge Neal Biggers*, 14, 15 (Oct. 22, 1992) (on file with the

1. Admissions Policies

First, the Court addressed the current admissions policies. The Supreme Court said the "present admission standards are not only traceable to the *de jure* system and were originally adopted for a discriminatory purpose, but they also have present discriminatory effects."[178]

At the district court, the plaintiffs argued that the Board used the ACT as a tool to segregate blacks and whites within the state system of higher education.[179] The plaintiffs contended that the ACT requirement was adopted by the Board as a direct result of the admission application of James Meredith.[180] The plaintiffs also argued that the Board's ACT requirements for different schools channeled blacks to HBIs and whites to HWIs. Moreover, the plaintiffs contended that the Board failed to follow the ACT program policies by not considering both high school grades and ACT test scores.[181]

The district court conceded that the ACT was "in fact adopted 'because of, not merely in spite of its adverse effects upon an identifiable group,'[182] [but that] much time has passed since 1962 and much has transpired with respect to the Board of Trustees' student admissions policies."[183] The court noted that the Board adopted minimum ACT scores in 1976 with valid nondiscriminatory reasons.[184] The district court said that there were valid concerns by the Board regarding the "level of scholastic preparation of entering freshmen."[185]

In response to the channeling argument raised by the

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[178] *Id.* at 2738-39.

[179] *Ayers*, 674 F. Supp. at 1554.

[180] *Id.* at 1565.

[181] *Id.*

[182] *Id.*, (quoting Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979)).

[183] *Ayers*, 674 F. Supp. at 1555.

[184] *Id.* While the Board did not adopt minimum ACT requirements until 1976, Judge Biggers also determined that in 1961 the Board authorized each institution to adopt its own minimum ACT requirements. In 1963, the three comprehensive institutions adopted ACT minimums of 15. USM and MSU admitted their first black students in 1965 and 1967, respectively. *Id.* at 1531.

[185] *Id.* at 1555.

plaintiffs, Judge Biggers found that the Board could not adopt uniform ACT requirements for all eight universities because of the "deleterious impact upon institutional enrollments, particularly at the three historically black institutions."[186] He said a minimum ACT score of fifteen would "decimate" enrollment at black institutions.[187] Judge Biggers also admitted that an ACT score of nine was quite low, but that the realities of the student body composition required that low scores be utilized by the black universities.[188] The district court found that the difference between ACT scores at HBIs and HWIs had significantly narrowed over the years.[189]

In response to the plaintiffs' argument regarding failure to use both high school grades and ACT scores, Judge Biggers found that the Board had valid concerns about grade inflation and the "lack of comparability in grading practices and course offerings among Mississippi's diverse high schools."[190] The district court found that the ACT organization considered the ACT score singly or in conjunction with grades to provide "a sound indicator of the level of preparation and the likelihood of success at the freshman level . . . ."[191] Thus, the district court concluded that the Board adopted these practices for "legitimate educational and fiscal concerns . . . ."[192]

Judge Biggers recognized the differences between ACT scores for Mississippi's black students and white students, but noted that the minimum scores were set at very modest levels.[193] He stated that ninety-five percent of ACT test takers score nine or above and seventy percent score fifteen or

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[186] *Id.*

[187] *Id.*

[188] *Ayers*, 674 F. Supp. at 1555.

[189] *Id.*

[190] *Id.* What this lack of comparability suggests is a much larger, statewide education problem at all levels. Almost every other college in the country utilizes a variety of factors in admissions standards, including high school grades. *Fordice*, 112 S. Ct. at 2740. For Mississippi to dismiss high school grades because of their diversity of grading practices is a different way of saying we have no confidence in the job we are doing of educating our young people.

[191] *Id.* at 1555-56.

[192] *Id.* at 1556.

[193] *Ayers*, 674 F. Supp. at 1556.

above.[194] Thus, the district court concluded that absent any proof of intentional discrimination neither Title VI nor the Fourteenth Amendment required the state to modify its admissions criteria due to a disparate impact on minority students.[195] Judge Biggers believed that if the admissions standards were valid, "enjoining [their] use would not . . . counteract the effects of past segregation, but might simply serve to perpetuate a dual standard, . . . by reinforcing the stereotype that minority students cannot satisfy generally applicable educational standards and by diluting educational benefits offered to all students, black and white."[196] Judge Biggers was not persuaded by the plaintiffs' channeling argument. He said the composite score of fifteen at HWIs and thirteen at HBIs did not significantly contribute to "racial identifiability of Mississippi universities."[197] Judge Biggers noted that HBIs were black because black students were "channeled" to HBIs after failing to achieve the requisite ACT score,[198] and that, "practically all the black students who applied to predominantly white universities in the Fall of 1986 were accepted."[199]

Thus, Judge Biggers concluded that the Board's admissions policies for the state institutions of higher learning were reasonable and educationally sound.[200]

In the Supreme Court's view, this conclusion missed the mark regarding the disproportionate impact the ACT automatic admission policies had on minority students.[201] Students who scored fifteen or above were automatically admitted to comprehensive institutions while those scoring a minimum of thirteen were automatically admitted to the historically black institutions.[202] The Supreme Court held, "[w]ithout doubt, these requirements restrict the range of choices of entering students as

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[194] *Id.*
[195] *Id.*
[196] *Id.* at 1557.
[197] *Id.*
[198] *Ayers*, 674 F. Supp. at 1556.
[199] *Id.* at 1557.
[200] *Id.*
[201] *Fordice*, 112 S. Ct. at 2739.
[202] *Id.*

to which institution they may attend in a way that perpetuates segregation."[203] The Court noted that in 1985 "seventy-two percent of Mississippi's white high school seniors achieved an ACT composite score of fifteen or better, while less than thirty percent of black high school seniors earned that score."[204]

The Supreme Court noted that the "segregative effects"[205] of the automatic entrance policy are particularly troublesome when the HBI's entrance requirements are compared with other regional institutions.[206] For example, MUW and DSU are both designated as regional institutions with eighteen and fifteen ACT minimums for automatic admission, respectively.[207] In contrast, ASU and MVSU, two historically black regional institutions, have a thirteen ACT minimum for automatic admissions.[208] The Supreme Court asserted that the district court basically concluded it is acceptable to maintain lower ACT levels at HBIs because blacks do not perform as well as whites on standardized tests. The courts below did not realize that they endorsed a dual educational system. Many Mississippians are comfortable with the way things are, and thus believe that the way things are, is the way things should be. Thus, the district court concerned itself with defending why HWIs and HBIs remained as they were, through no fault of the State's admissions policies, rather than questioning the practicality of eliminating the differences in entrance requirements.[209]

The Supreme Court had difficulty with two additional arguments of the State's admissions policies. First, the Court did not understand why the difference in program missions between institutions necessarily justified different admissions requirements.[210] The Court was particularly disturbed here because the "differential admission standards are remnants of

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[203] *Id.*; *see* Kendall, Note, *supra* note 93, at 689-91 (arguing need for judicial standards to measure state compliance with desegregation).

[204] *Fordice*, 112 S. Ct. at 2739.

[205] *Id.*

[206] *Id.* at 2740.

[207] *Id.* at 2739.

[208] *Id.*

[209] *Fordice*, 112 S. Ct. at 2740.

[210] *Id.* at 2739.

the dual system with a continuing discriminatory effect, and the mission assignments to some degree follow the historical racial assignments."[211]

Second, the Court found the disregard for high school grades educationally unsound in making admissions decisions.[212] The ACT program officials advised against relying solely on the test scores because the test score alone does not present a complete picture of the students' aptitude for college work. Indeed, the Supreme Court cited an ACT program report that said "it would be foolish to substitute a three or four-hour test in place of a student's high school grades as a means of predicting college performance."[213] Moreover, the Court noted that the gap between black and white high school grades was much narrower than that between their average ACT scores.[214]

The Board's concern with grade inflation and disparate grading practices among high schools persuaded the district court and court of appeals. However, the Supreme Court concluded that "because the ACT requirement was originally adopted for discriminatory purposes, the current requirement is traceable to that decision and seemingly continues to have segregative effects."[215] Thus, the State needs to demonstrate that the "ACT-only" admission standard is not susceptible to elimination without eroding sound educational policy."[216] Therefore, the "ACT-only" admissions policy adopted by the State had its origins in a *de jure* system and was not justified by any good educational reason.[217]

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[211] *Id.* The Fifth Circuit Court of Appeals disagreed with the district court and found that the disparities among the schools were reminiscent of the former *de jure* segregated system but the policies were no longer racially motivated. Ayers v. Allain, 914 F.2d 676, 692 (5th Cir. 1990).

[212] *Fordice*, 112 S. Ct. at 2740.

[213] *Id.*

[214] *Id.*

[215] *Id.*

[216] *Id.*

[217] *Fordice*, 112 S. Ct. at 2740.

2. *Program Duplication*

The duplication of undergraduate and graduate programs among HBIs and HWIs also concerned the Supreme Court.[218] Despite the district court's finding that almost thirty-five percent of the undergraduate programs at HBIs were duplicated by HWIs and ninety percent of the graduate programs at HBIs were duplicated by HWIs,[219] it concluded that there was no proof that duplication was related to the racial identifiability of the schools.[220] The district court concluded that the plaintiffs had offered no proof that eliminating program duplication would affect student choice or be educationally justifiable.[221] Another problem for the Court arose because the district court appeared to place on the plaintiffs a burden of proof to show duplication contributed to the segregative effects.[222]

The district court's placing the burden of proof on the plaintiffs to meet an unformulated legal standard troubled the Supreme Court.[223] *Brown*, however, required that the burden of proof was on the State to establish that it had eliminated a prior *de jure* system.[224] Thus, the district court improperly shifted the burden of proving the elimination of a constitutional defect from the State to the individuals.[225] The district court acknowledged that this duplication was wasteful but said "[t]his case is not about the efficiency or the economic wisdom of higher education policies. It is about the charge of racial discrimination in higher education."[226] The Supreme Court concluded that "[i]t can hardly be denied that such duplication was part and parcel of the prior dual system of higher education - the whole notion of 'separate but equal' required

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[218] *Id.*
[219] *Id.* at 2740-41.
[220] *Id.* at 2741.
[221] *Id.*
[222] *Fordice*, 112 S. Ct. at 2741.
[223] *Id.*
[224] *Id.*
[225] *Id.*
[226] *Ayers*, 674 F. Supp. at 1541.

duplicative programs in two sets of schools . . . . "[227] The Supreme Court also noted that the district court should not have treated the issue of program duplication in isolation from other policies.[228]

3. *Institutional Mission Designations*

On November 19, 1981, the Board of Trustees of State Institutions of Higher Learning adopted mission statements for all eight of its universities.[229] The premise of these statements were:

> The general purpose of mission statements is to provide appropriate differential roles of various state universities. The general objective shall be quality performance of assigned and approved program endeavors. All programs are subject to periodic review by the Board of Trustees in terms of need, viable size, and effective performance. Based upon program reviews, the role and scope of any university may be adjusted from time to time.[230]

Any new program outside the scope of these mission statements required "extraordinary justification" before consideration by the Board.[231]

The plaintiffs argued in the lower court that the 1981 allocation of missions perpetuated the effects of *de jure* discrimination.[232] They contended that the designated comprehensive institutions were ensured of receiving a greater part of limited resources.[233] Thus, the plaintiffs asserted that the State should disregard the mission designations and enhance the HBIs programs in order to equalize HBIs with HWIs.[234]

The plaintiffs' argument failed to persuade the district court. Moreover, the argument had strong separate but equal

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[227] *Fordice*, 112 S. Ct. at 2741.
[228] *Id.*
[229] MISSION STATEMENTS, *supra* note 55, at 1, app. A.
[230] *Id.*
[231] *Id.*
[232] *Ayers*, 674 F. Supp. at 1560.
[233] *Id.*
[234] *Id.*

overtones reminiscent of *Plessy v. Ferguson*.[235] Judge Biggers concluded that the mission statements were legitimately justified as an effort to "conserve scarce educational resources."[236]

The Supreme Court concluded that because the mission designations were based on policies enacted during *de jure* segregation, the existence of different missions for different universities "limits to some extent an entering student's choice as to which university to seek admittance."[237]

Given the role of each institution in the state prior to 1954, one would have no difficulty in concluding, as the Supreme Court concluded, that the mission assignments and designations continue to perpetuate a racially unequal educational system.[238] This racially unequal system originated with the initial chartering of the schools. Even though the district court found that the 1974 Plan of Compliance assigned institutional missions based on "financial resources,"[239] one cannot ignore the historical limitations under which HBIs originally developed. Thus, in my opinion, mission designations which are tied to limited roles will continue to be problematic in terms of resource distribution and student choice.

This is consistent with the Supreme Court's assessment, because the primary question is "whether the State has suffi-

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[235] 163 U.S. 537 (1896). Homer Adophy Plessy refused to leave a seat designated for white passengers only on the East Louisiana Railway. *Id.* at 538. Louisiana law required that the railway companies were to provide "equal but separate accommodations for the white and colored races." *Id.* at 540. The companies could do this by providing separate cars or partitioning cars. The law imposed a $25 fine or imprisonment for twenty days for violations. *Id.* at 541. The law exempted "nurses attending children of the other race." Plessy was seven-eighths Caucasian and one-eighth African and was indistinguishable from the white population. *Id.* Plessy maintained that he was entitled to all rights secured by the white race and took a vacant seat in a coach reserved for whites only. *Id.* at 538. The conductor requested that Plessy take a seat reserved for colored passengers and Plessy refused. *Id.* at 542. Plessy was then forcibly removed and taken to the parish jail. Plessy challenged the Louisiana law and the Court held the law as a reasonable exercise of state police power and did not interfere with interstate commerce. *Id.* at 548. This decision stamped judicial approval on the doctrine of separate but equal. *Id.*

[236] *Ayers*, 674 F. Supp. at 1561.

[237] *Fordice*, 112 S. Ct. at 2742.

[238] *Id.*

[239] *Ayers*, 674 F. Supp. at 1539.

ciently dismantled its prior dual system."[240] The Supreme Court stated where there exists "differential admission practices and unnecessary program duplication, it is likely that the mission designations interfere with student choice and tend to perpetuate the segregated system."[241] Thus, on remand, the Supreme Court instructed the district court to consider "whether it would be practicable and consistent with sound educational practices to eliminate any such discriminatory effects of the State's present policy of mission assignments."[242]

4. *Fewer Institutions*

The Supreme Court's *Fordice* opinion is a landmark decision for higher education. One of the most important elements of this decision was the Court's willingness to suggest to the district court that it consider on remand whether maintaining eight universities will help bring the State into compliance with the Constitution. The Court noted that eight universities in the State clearly related to the prior *de jure* system.[243] The Court also emphasized the district court's recognition that "maintaining all eight universities in Mississippi is wasteful and irrational."[244] The district court stated:

> [T]he issues of this case are not about the inefficiency for example of having two state universities only 20 miles apart in the eastern part of the state with separate administrations and duplicating programs, and two state universities on the western side of the state only 50 miles apart, each with separate administrations and duplicating programs. The issues are not about the economic efficiency of funding traditionally black and traditionally white universities which duplicate as many as 75% of each other's baccalaureate programs. Nor do the issues in the case deal with the wisdom of maintaining a system which required in hard economic times of 1981-86 the first university of the state, the University of Mississippi, to drop more programs than was required of a smaller,

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[240] *Fordice*, 112 S. Ct. at 2742.
[241] *Id.*
[242] *Id.*
[243] *Id.*
[244] *Id.*

> noncomprehensive university; nor do the issues deal with the attempt by the state to maintain three comprehensive universities which compete with each other for the financial resources available, when larger surrounding states with larger higher education budgets maintain only one premier comprehensive university per state.
>
> What the issues of this case are about are the Constitution and the laws of the United States as they apply to the offering of higher education by the State of Mississippi to its citizens and whether any practices or policies of the state in the higher education field are racially motivated to bring about results which deprive black citizens of benefits provided to white citizens.[245]

Thus, Judge Biggers held that the Board adopted race-neutral policies and complied fully with its "affirmative duty to disestablish the former *de jure* segregated system of higher education."[246] He conceded that the Board funded more schools than for which it had the available resources. However, he said that was a legislative decision that affects the quality of the institutions.[247] It is quite troubling for the district court and court of appeals to sanction a system that provides, under these circumstances mediocre education.

The Supreme Court, citing *United States v. Louisiana*,[248] said that the record was too incomplete to determine whether closure of one or more schools would be necessary.[249] The Court said it may be possible to cure the constitutional violation by eliminating program duplication and changing the admissions requirements.[250] The Supreme Court's instructions on this point were clear. The Court said,

> [o]n remand this issue should be carefully explored by inquir-

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[245] *Ayers*, 674 F. Supp. at 1563-64.

[246] *Id.* at 1564.

[247] *Id.*

[248] 718 F. Supp. 499, 514 (E.D. La. 1989). The United States District Court ordered a restructuring of Louisiana's higher education system in order to desegregate a prior *de jure* system. The merger of two state law schools was part of the restructuring. *Id.*

[249] *Fordice*, 112 S. Ct. at 2743.

[250] *Id.*

> ing and determining whether retention of all eight institutions itself affects student choice and perpetuates the segregated higher education system, whether maintenance of each of the universities is educationally justifiable, and whether one or more of them can be practicably closed or merged with other existing institutions.[251]

Thus, the Supreme Court concluded that students in Mississippi do not have true free choice in college institutions because of the connection between a prior *de jure* system and current segregative policies.[252] The Court placed the burden on the State to take the necessary steps to dismantle the prior system and ensure that student choice becomes truly free.[253] To meet this obligation, the Court held that the "full range of policies and practices must be examined."[254]

Significantly, the Supreme Court clarified how far the Constitution permitted the plaintiffs to go as they sought remedies. On this point, the Court said:

> If we understand private petitioners to press us to order the upgrading of Jackson State, Alcorn State, and Mississippi Valley *solely* so that they may be publicly financed, exclusively black enclaves by private choice, we reject that request. The State provides these facilities for all its citizens and it has not met its burden under *Brown* to take affirmative steps to dismantle its prior *de jure* system when it perpetuates a separate, but "more equal" one. Whether such an increase in funding is necessary to achieve a full dismantlement under the standards we have outlined, however, is a different question, and one that must be addressed on remand.[255]

Thus, the Court ruled that equal funding may not necessarily be the path toward full dismantlement of a prior *de jure* segregated system. The lower courts must answer that question on remand after inquiring whether the "State perpetuates policies and practices traceable to its prior system that continue to

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[251] *Id.*
[252] *Id.*
[253] *Id.* at 2743.
[254] *Fordice*, 112 S. Ct. at 2743.
[255] *Id.*

have segregative effects."[256] Therefore, the Court concluded that the State did not meet "its affirmative obligation to dismantle its prior dual system,"[257] and violated the Equal Protection Clause of the Constitution and Title VI of the Civil Rights Act of 1964.[258]

Justice O'Connor wrote a separate concurring opinion to emphasize that the State has the burden of proving that it has eliminated its prior segregated system.[259] In analyzing Mississippi's history of discrimination, Justice O'Connor said the lower courts "must carefully examine Mississippi's proffered justifications for maintaining a remnant of *de jure* segregation to ensure that such rationales do not merely mask the perpetuation of discriminatory practices."[260] Justice O'Connor also said that it follows from the State's obligation that the State must demonstrate that it has "counteracted and minimized the segregative impact" of any policies found necessary to be maintained that are remnants of its prior system but essential elements needed to accomplish legitimate educational goals.[261] Justice O'Connor says that discriminatory systems in this country should only be a "distant memory."[262] I agree that they should be a distant memory; unfortunately they are a current reality.

Justice Thomas also wrote a concurring opinion to emphasize that the new standard adopted in *Fordice* is different from *Green* in the grade-school context.[263] Justice Thomas said that the *Fordice* standard was different because it did not require

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[256] *Id.* at 2737

[257] *Id.* at 2743.

[258] *Id.* The Supreme Court said that the court of appeals misanalyzed the Title VI claim. *Id.* at 2737 n.7. The court of appeals, in *Ayers*, relied on the conclusion reached by the Supreme Court that there was no Title VI violation in *Bazemore* without performing the same inquiry that the Supreme Court performed in *Bazemore*. *Id.* Citing Regents of University of California v. Bakke, 438 U.S. 265, 287 (1978), the Supreme Court said precedent reveals that the reach of Title VI is concentric with that of the Fourteenth Amendment. *Fordice*, 112 S. Ct. at 2737-38.

[259] *Fordice*, 112 S. Ct. at 2743 (O'Connor, J., concurring).

[260] *Id.* at 2743-44 (O'Connor, J., concurring).

[261] *Id.* at 2744 (O'Connor, J., concurring).

[262] *Id.* (O'Connor, J., concurring).

[263] *Fordice*, 112 S. Ct. at 2744-45 (Thomas, J., concurring).

the elimination of racial imbalance. Thus, he recognized the possibility that historically black colleges could constitutionally be maintained.[264] Justice Thomas emphasized that whatever merit the *Green* decision had in the grade-school context, it was not the appropriate approach in the higher-education context.[265] The Court, in his view, expressly rejected the use of *Green*-type remedies, such as, student reassignment.[266] Therefore, Justice Thomas said the focus must be on the policies that produce racial imbalance.[267] Moreover, he offered practical guidance to the district court by noting that the district court's time would be best spent in determining whether the policies at issue have a justifiable educational purpose.[268] This task is more manageable and more narrow than that required in *Green*, which required district courts to effectuate remedies that reduce the racial imbalance.[269] Thus, a policy will fail "if it began during a prior *de jure* era, produces adverse impacts, and persists without sound educational justification."[270]

Justice Thomas' concurring opinion also contained a very important statement regarding the educational value of the historically black colleges. He said the *Fordice* opinion in no way detracted from sound educational justifications for maintaining HBIs.[271] He cited the success of black colleges and their importance in the lives of many black Americans.[272] Justice Thomas pointed to HBIs as a legitimate example of educational diversity.[273] He concluded by stating that "[i]t would be

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[264] *Id.* (Thomas, J., concurring). Justice Thomas' argument brings to mind the diversity argument raised in the dissent in Mississippi University for Women v. Hogan, 458 U.S. 718 (1982); *see also infra* note 273.

[265] *Id.* at 2745 (Thomas, J., concurring).

[266] *Id.* (Thomas, J., concurring).

[267] *Id.* (Thomas, J., concurring).

[268] *Id.* (Thomas, J., concurring).

[269] *Fordice*, 112 S. Ct. at 2745 (Thomas, J., concurring).

[270] *Id.* (Thomas, J., concurring).

[271] *Id.* at 2746 (Thomas, J., concurring). *But see*, *The Supreme Court—Leading Cases*, 106 HARV. L. REV. 230, 235 (1992) (commenting that *Fordice* poses a serious threat to state supported black universities).

[272] *Id.* (Thomas, J., concurring).

[273] *Id.* (Thomas, J., concurring); *see* United States v. Virginia, 976 F.2d 890 (4th Cir. 1992), *vacating* United States v. Virginia, 766 F. Supp. 1407 (W.D. Va. 1991). Judge Neimeyer, writing for a unanimous court, vacated Judge Kiser's opinion and

ironic, to say the least, if the institutions that sustained blacks during segregation were themselves destroyed in an effort to combat its vestiges."[274]

Justice Scalia concurred in the judgment in part but dissented with the majority opinion in part. Justice Scalia agreed that the Constitution compels Mississippi to remove the discriminatory barriers to its state-funded universities. He also agreed that the Constitution does not require equal funding

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remanded the case to the district court. In a complex opinion, the Fourth Circuit held that while VMI adequately justified its single-gender admission policy with its institutional mission, it failed to justify why the state offers this unique educational opportunity only to men and not women. The Fourth Circuit concluded that:

> (1) VMI's program of single-gender education was justified by a legitimate and relevant institutional mission which favors neither sex;
> (2) Admitting women to VMI will materially alter the very program in which women seek to participate;
> (3) The Commonwealth of Virginia, despite a policy of diversity has failed to articulate a good reason for offering the VMI type education to men and not women.

Id. at 900. Thus, the Fourth Circuit remanded to the district court to allow Virginia to determine a course of action that will be consistent with the Fourteenth Amendment. The Commonwealth could decide to admit women to VMI and adjust the program to implement that choice, or it might develop a women's military school, or it might abandon state support of VMI, letting VMI pursue its policies as a private institution. *Id.*

The district court dealt with the question of whether the State can maintain a single sex institution of higher learning. United States v. Virginia, 766 F. Supp. 1407 (W.D. Va. 1991). Judge Kiser for the District Court of Virginia held that VMI's single-sex status and its distinctive educational method represent legitimate contributions to diversity in the Virginia higher education system. *Id.* at 1414. Judge Kiser's analysis at the district court was very consistent with Justices Powell's and Rehnquist's dissent in Mississippi University for Women v. Hogan, 458 U.S. 718, 735 (1982). In *MUW*, the Supreme Court held in a five-four decision that the University's single-sex (female) admissions policy violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 731. Justices Burger, Blackmon, Powell and Rehnquist dissented. Justices Powell and Rehnquist in their dissent stated that Hogan was not significantly disadvantaged by the MUW single sex policy but merely inconvenienced because he could not attend nursing school in his hometown. *Id.* at 736. They argue that this country has historically educated students in sexually segregated classrooms and all female schools provide an element of diversity. In such an environment women speak up more in classes and hold more positions of leadership. *Id.* at 736-37. Thus, Judge Kiser in the *VMI* case justified VMI's single-sex (male) admissions policy on the basis of this diversity argument raised in *MUW*.

[274] *Fordice*, 112 S. Ct. at 2746 (Thomas, J., concurring).

between the State's historically black and historically white schools. Additionally, Justice Scalia agreed that the ACT program in Mississippi should be reviewed. But he rejected the application of what he called effectively the *Green* standard in the context of higher education.[275] He launched a blistering attack on the majority, labeling the opinion confusing because it offered "something-for-all, guidance-to-none."[276] Justice Scalia believed that the Court imposed an unsustainable burden on the State to demonstrate compliance with *Brown I*.[277] Justice Scalia criticized the opinion as being without guidance. He said it was not at all clear what the Court meant by "substantially restrict[ing] a person's choice of which institution to enter."[278] Justice Scalia also attacked the majority's aggregation theory, which required the lower courts to look at separate indicia of a prior *de jure* system in the aggregate.[279] Justice Scalia believed that the *Bazemore* standard was instructive here and should be followed.[280] That standard for dismantling a dual educational system is simply the discontinuation of discriminatory practices and the adoption of a neutral admissions policy.[281]

IV. UNFINISHED BUSINESS

The Supreme Court's decision in *Fordice* left to the United States District Court for the Northern District of Mississippi a number of areas that need additional inquiry based on the new standard.[282] The newspaper headlines both nationally and in Mississippi indicated that the Supreme Court told Mississippi to desegregate.[283] In my view these headlines were a bit misleading. What the Supreme Court did say in the *Fordice* opin-

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[275] *Id.* at 2746-47 (Scalia, J., dissenting).
[276] *Id.* at 2753 (Scalia, J., dissenting).
[277] *Id.* at 2746 (Scalia, J., dissenting).
[278] *Id.* at 2747 (Scalia, J., dissenting).
[279] *Fordice*, 112 S. Ct. at 2747-48 (Scalia, J., dissenting).
[280] *Id.* at 2750-51 (Scalia, J., dissenting).
[281] *Id.* at 2757 (Scalia, J., dissenting).
[282] *Id.* at 2737.
[283] Reagan Walker, *Supreme Court's Order: Desegregate*, THE CLARION-LEDGER (Jackson, Miss.), June 27, 1992, at 1A (newspaper interpreted decision as one that could reshape higher education).

ion was that the lower courts used an incorrect standard. The Court directed the lower courts to apply the correct standard while reviewing a number of areas. The new standard provides that:

> [I]f the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects—whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system—and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system.[284]

This new standard is far from easy to apply. Indeed, it contains several rather complex aspects that could result in a conclusion that Mississippi's present system is constitutionally acceptable. First, the new standard requires the court to determine whether the State has policies traceable to a prior *de jure* system that continues to have segregative effects. This allows for the possibility that policies may still be traceable to a past *de jure* system even though the policies no longer have a segregative effect. Second, the standard makes it possible to determine that such policies have a sound educational justification despite their link to a prior *de jure* system. Third, the standard may permit the continuation of current policies that are linked to a prior *de jure* system, do not have a sound educational justification, but remain because they cannot be practicably eliminated. Fourth, the standard provides that if there is no sound educational justification for the policy and the policy can be practicably eliminated then the State has not satisfied its burden of proving that it has dismantled its prior system. But, as the first three options indicate, the State may demonstrate that it has done all it can do to dismantle its prior system even if it maintains policies that are traceable to a past *de jure* system which do not have a sound educational justification, because certain policies cannot be practicably eliminated.

Additionally, one must consider what the Court meant by

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[284] *Fordice*, 112 S. Ct. at 2737.

"sound educational justification" and "practicably eliminated." The opinion contains no guidance on the meaning of these terms, which usually suggests that future decisions will bear the burden of clarification. The district court will find it difficult to apply this standard in resolving the issues left open by the Supreme Court's decision. Moreover, the standard will be harder to apply because the Supreme Court required the district court to hear additional evidence on whether or not certain aspects of the State's higher education system have sound educational justification and can be practicably eliminated.

Thus, the task now before the district court is to encourage the parties to agree on a solution or to begin to address the following issues:

1. The Supreme Court required the district court to develop additional evidence to determine whether the State can justify in educational terms the disparities in entrance requirements among the schools, or to inquire whether it was practicable to eliminate them.[285]

2. The Supreme Court required the district court to develop additional evidence to determine whether the State can justify differential admissions requirements between universities with dissimilar programmatic missions.[286]

3. The Supreme Court required the district court to properly place the burden of proof on the State to prove educational justification for program duplication rather than shifting the burden to the plaintiffs to prove that eliminating unnecessary duplication would decrease institutional racial identifiability, affect student choice, and promote educationally sound policies.[287]

4. The Supreme Court required the district court to develop more evidence on whether any educational justification exists for program duplication. Additionally, the district court must develop more evidence on whether program duplication can practicably be eliminated.[288]

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[285] *Fordice*, 112 S. Ct. at 2739.
[286] *Id.*
[287] *Id.* at 2741.
[288] *Id.*

5. The Supreme Court indicated in the following passage that it was unclear what the wishes were of the district court:

> Yet by stating that there is no proof that elimination of unnecessary duplication would decrease institutional racial identifiability, affect student choice, and promote educationally sound policies, the court did not make clear whether it had directed the parties to develop evidence on these points, and if so, what the evidence revealed.[289]

6. The Supreme Court also instructed the district court to consider program duplication and other policies, such as differential admissions standards, to evaluate whether the State met its duty to dismantle its prior *de jure* segregated system.[290]

7. The Supreme Court also required the district court to inquire whether it would be practicable and consistent with sound educational practices to eliminate any discriminatory effects of the State's present policy of mission assignments.[291]

8. The Supreme Court required the district court to determine whether retention of all eight institutions alone was sufficient to affect student choice and to perpetuate the segregated higher education system, whether maintenance of each of the universities may be justified in educational terms, and whether one or more of the universities can be practicably closed or merged with other existing institutions.[292]

9. The Supreme Court required the district court to consider whether enhanced funding to the HBIs is necessary to fully dismantle the dual educational system in Mississippi.[293]

Thus, the Supreme Court left the district court with a laundry list of items that need to be addressed. The *Fordice* decision raised questions regarding whether or not certain existing policies could survive the application of the new standard, but it required sifting and weighing of the evidence before any conclusion could be made. Although many concluded

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[289] *Id.*
[290] *Fordice*, 112 S. Ct. at 2741.
[291] *Id.* at 2742.
[292] *Id.* at 2742-43.
[293] *Id.* at 2743.

that the *Fordice* decision was a clear victory for the plaintiffs, I am reluctant to draw the same conclusion. I will not be surprised to hear the plaintiffs sound a retreat from this so-called victory as the district court begins to implement the decision.

V. REMEDIES

"There exists among us by ordinary-both North and South-a profound conviction that the South is another land, sharply differentiated from the rest of the American nation, and exhibiting within itself a remarkable homogeneity."[294] Perhaps this helps to explain why after thirty-eight years Mississippi continues to maintain a dual educational system. The challenge before Mississippi is to construct a system that will comply with constitutional requirements and provide a quality education for all of its citizens, black and white. The issues of race seem to consume this state and its people. Never before have I lived in a place where one's whiteness or blackness carried with it such significance. I have lived in Oxford, Mississippi for almost five years, and this experience has heightened my race consciousness. The increased awareness of racial distinctions, especially to a Northerner growing up in the idyllic corn fields of Iowa, suggests that there is something terribly wrong in Mississippi.

This part of the article will explore the possible solutions to the problems discussed by the *Fordice* majority. I am not naive enough to believe that I will make many friends as I articulate the possibilities for Mississippi's higher education system. To the contrary, many readers, particularly most Mississippians, will react with outrage, concern, bitterness, and trepidation at the suggestion of reducing the number of state institutions to no more than three. Such a reaction crosses the color line because both blacks and whites reject the idea of changing the status quo. Thus, there is little optimism about the likelihood of the adoption of the solution contained herein, not only because of the existence of numerous vested interests in the present system, but also the lack of willingness on the

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[294] W.J. CASH, THE MIND OF THE SOUTH at vii (1969).

part of most Mississippians to sacrifice present allegiances for future excellence in education. The advocacy of merger, consolidation and/or closure has, over the last five years, engendered lively and emotional discussions in many constitutional law classes. The more I have discussed it with my students and colleagues, the more convinced I am that it is the only way to guarantee quality education in the future.

Ultimately in litigation, the resolution of lawsuits turns on remedies that may be available either through judicial decree or through settlement. The question of remedies in *Fordice* is at the heart of resolving the case and is an area that has yet to be addressed by the courts. Indeed, the remedies issue is the most important and perhaps the most complex aspect of the case. Additionally, the possibilities that exist in fashioning a remedy are challenging. The remedies that are developed to address these concerns will demonstrate the impact of the Supreme Court decision and the willingness of Mississippi to advance its educational system. Those remedies can be developed from three sources; the parties, the legislature, or the district court. The parties and the legislature have all but directly stated that a solution will not be forthcoming from either of them.

A. The Parties

Since the Supreme Court decision on June 26, 1992, Watkins & Eager and the State Attorney General's office, who represented the State and defended its position regarding race-neutral admissions policies and compliance with the Constitutional commands of the Fourteenth Amendment, have been exceedingly quiet and cautious regarding their reaction to the *Fordice* decision. The State College Board's President, Frank Crosthwait, indicated that Mississippi now had an opportunity to resolve the issues that led to *Ayers*.[295] Crosthwait's comments indicated that the Board wished to develop "a consent

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[295] Reagan Walker & Sarah Campbell, *College Board Vows to Comply*, THE CLARION-LEDGER (Jackson, Miss.), June 28, 1992, at 1A.

resolution"[296] with the plaintiffs, the United States Department of Justice, and the State. Comments from State Attorney General Mike Moore also indicated the State's interest in resolving the outstanding issues.[297] Clyda Rent, President of Mississippi University for Women, expressed her optimism at Mississippi's opportunity to take a leadership role in higher education.[298]

Unfortunately, there was reason to doubt that this environment of optimism and reconciliation would prevail. During a two hour meeting between the State College Board and the university presidents, several college presidents indicated disapproval of closing any of the State's universities, particularly historically black colleges. Mississippi Valley State University Vice President, Roy Hudson, said: "[w]hen the question comes up about closing universities, why do people always talk about closing the black universities. Why should the burden of ridding the system of vestiges of discrimination fall on the black people."[299]

In contrast to the caution demonstrated by representatives of the State, Alvin O. Chambliss, representing the plaintiffs, saw the *Fordice* decision as a total victory.[300] He maintained all along that his goal was "better funding and programs for black universities."[301] He suggested that the State could place more exclusive programs at HBIs. He also noted that the State should provide additional funding to hire faculty for black uni-

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[296] *Id.*

[297] *Id.* at 15A. In a two hour private meeting to discuss the *Ayers* decision with State officials and university presidents, the Clarion-Ledger quoted Moore as saying: "We've spent too many years and too much money on things like this in Mississippi, and I hope we can turn the page and move forward." *Id.*

[298] *Id.*

[299] *Id.*

[300] Chris Demaske, *Ayers Victor: State Under Gun to Desegregate, Equalize*, THE CLARION-LEDGER (Jackson, Miss.), June 27, 1992, at 11A.

[301] *Shut-Down Delta State, Ayers Lawyer Advises*, THE CLARION-LEDGER (Jackson, Miss.), July 3, 1992, at 1B. Chambliss maintains that black institutional success is measured by its white enrollment. He believes that the presence of majority students provides security for minority schools. Chambliss contends that no one is concerned about the standards at universities only attended by black students. He argues that "[w]hite folks will not send their children to a substandard school, so the test to see if we are well-funded is how many white people come." *Id.*

versities and provide better pay for the faculty already there.[302] Chambliss also indicated that neither black nor white universities should be harmed by the ruling.[303] Shortly thereafter, however, Chambliss said "Delta State should be wiped off the map."[304]

I discussed these issues with Mr. Chambliss in early July and he indicated a willingness to approach the negotiating table as long as "all of the players are present."[305] Chambliss stated, however, that a restructuring could not take place without a review of the role of the State's fifteen junior colleges.[306] Though Chambliss expressed a willingness to negotiate, he raised an objection to the State Commissioner of Higher Education, Ray Cleere.[307] Reacting to statements made by Crosthwait and Moore, Chambliss said, "[w]e're prepared to sit down with anybody, but the person who is implementing the policies has been implementing some very pernicious policies, and that's Ray Cleere."[308]

More recently, on October 22, 1992 at the United States District Court for the Northern District of Mississippi, Judge Neal Biggers held a hearing for the express purpose of receiving proposals from the parties that would settle the litigation. During the hearing, it became apparent that the parties were miles apart in their proposals for settling the lawsuit.[309] Un-

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[302] *Id.*

[303] *Id.*

[304] *Id.* During a conversation I had with Mr. Chambliss subsequent to this statement's publication, he told me that the quote was taken out of context. He said his comments were directed to the program duplication currently existing between Delta State and Mississippi Valley State University. Interview with Alvin O. Chambliss, Counsel for plaintiffs, *United States v. Fordice*, in Oxford, Miss. (July 1992).

[305] *Id.*

[306] See app. C for a map of Mississippi junior colleges.

[307] Interview with Alvin O. Chambliss, Counsel for plaintiffs, *United States v. Fordice*, in Oxford, Miss. (July 1992).

[308] Reagan Walker & Sarah Campbell, *College Board Vows to Comply*, THE CLARION-LEDGER, June 28, 1992, at 15A.

[309] I called Judge Biggers two weeks before the scheduled hearing in order to obtain permission to sit in on the discussion. At that time, all proceedings had been conducted privately and I was not sure whether the conference scheduled for October 22, 1992 would be another private meeting. Judge Biggers subsequently

fortunately, there was no agreement between the private plaintiffs, the government, and the defendants regarding which issues to focus on for settlement discussions. There were major differences between the plaintiffs' proposals and the defendants' proposals. The plaintiffs do not want to close any of the eight universities, and would prefer open admissions that would enable anyone successfully completing high school to enroll in an institution of higher learning. They also feel that the College Board should be restructured to permit more minority representation. Furthermore, the plaintiffs call for more scholarships to get black students to white schools and white students to black schools and they seek bilateral hiring of black faculty and staff. Additionally, they seek facility enhancement for the black colleges. One of the more controversial aspects of the plaintiffs' proposal involves the role of the State's fifteen junior colleges.[310] The plaintiffs contend that there can be no comprehensive settlement unless the junior colleges are a part of the solution. For example, in the plaintiffs' view, Hinds Community College directly competes with Jackson State University.[311]

In contrast, the State College Board chose to focus on the four areas outlined in the Supreme Court's June 26, 1992 opinion in *Fordice*. The defendants have proposed a plan that they believe goes beyond the constitutional requirement articulated in *Fordice*. The defendants claim that the plaintiffs are now running from the decision. They indicated that the question regarding maintaining eight schools was independently raised by the Supreme Court. The College Board's proposal would allow the University of Southern Mississippi to take control of Mississippi University for Women. Mississippi State University would control Alcorn State. The University of Mississippi would oversee a merger of Delta State and Mississippi Valley State Universities. Jackson State University would take over the Universities Center in Jackson, and would add several addi-

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decided to hold a public hearing and distributed passes on a first come first serve basis. Fortunately, I received a pass and was present during the hearing.

[310] See app. C for a map of Mississippi junior colleges.

[311] These proposals were presented to Judge Biggers on October 22, 1992. The author has relied on his notes and the transcript of October 22, 1992.

tional program offerings including engineering technology and a Master's Program in social work. Jackson State would also offer graduate degrees in public administration, environmental science and mathematics, and would receive enhanced funding for programs and facilities.

Regarding admissions, the College Board's proposal would require all universities to have the same policy. Students with a 3.2 grade point average (GPA) and above would be admitted without the ACT. Students with a 2.5 and above would need a minimum ACT of 16. Students with a 2.0 GPA would need a minimum ACT of 18.

The College Board does not believe the junior colleges should be brought into the lawsuit, and it seeks no change in the Board's configuration. Additionally, the College Board recommended closing the Veterinary Science School and the Dental School in order to develop more resources for enhancement at Jackson State University.[312]

Thus, major differences exist between the parties for proposed resolution of the lawsuit. While there are strengths and weaknesses in both proposals, in my view, neither proposal goes far enough. Moreover, the inability of the parties to agree even on the issues that will be discussed paints a bleak picture for any hope of resolution.

The plaintiffs attempt to maintain the present system as it is by suggesting additional funding for the HBIs and a realignment of programs is a not so subtle attempt to accomplish indirectly what the Supreme Court expressly told the plaintiffs it would not condone.[313] While I do not take issue with the plaintiffs' interest in discussing a broader spectrum of issues than the four the Supreme Court thought were readily apparent vestiges of a *de jure* system, I believe that the present position taken by the plaintiffs does not contribute to moving forward toward a resolution of the litigation.

Similarly, the defendants' proposal is not a panacea. The

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[312] *Id.*

[313] The Supreme Court expressly stated that if the plaintiffs were requesting the court to condone "publicly financed, exclusive black enclaves by private choice, we reject that request." *Fordice*, 112 S. Ct. at 2743.

defendants' proposal, however well-intentioned, was criticized for potentially reducing the availability of educational opportunities to black citizens of Mississippi. Moreover, it was viewed by at least two representatives of the state legislature as more of the same unfairness to black schools that had existed before the *Fordice* decision.[314] The arguments presented by both the private plaintiffs and the Department of Justice was first, that there was no need to close any schools. Second, plaintiffs argued that it was unfair to close black schools when the State has been unfair to these schools in the past. The plaintiffs criticized the College Board's proposal because it vested control authority in the larger comprehensive schools over the smaller schools. The reason these schools are smaller and poorer is precisely because of the past discrimination. Thus, in the plaintiffs' view, to develop realignment in the fashion that has been proposed is simply making the black schools bear the burden of the discrimination that has historically been the product of State action.

The time is ripe for Judge Biggers to propose alternative dispute resolution in the form of arbitration or mediation. This process could assist the parties in developing a common ground upon which to build the foundation for constructive settlement discussions. Thus far, the issue of alternative dispute resolution has not been raised.

B. The Legislature

Based on the Mississippi legislature's failure to reach a consensus in 1986 regarding the closing of MUW, there is little optimism that a consensus would be reached in the present situation.[315] The Mississippi Constitution provides that the State Legislature is elected every four years.[316] The legislative

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[314] During the hearing, I sat between two black members of the State Legislature. Both agreed that what the College Board was doing was reorganizing higher education in Mississippi at the expense of the black schools.

[315] Dr. Jack D. Foster, *Restructuring Higher Education: Choices and Analysis for Mississippi*, 105-19 (1985). This report provided the foundation for developing the legislative proposal to close MUW. Additionally, the report explores other targets for restructuring higher education in Mississippi.

[316] MISS. CONST. art. IV, §§ 34-35.

authority of the State is placed in a bicameral legislature.[317] The Mississippi Senate is divided into 52 districts with one State Senator representing each district.[318] The Mississippi House is divided into 122 districts with one State Representative elected from each district.[319]

The political process has already begun to rally a variety of interest groups to protect selected institutions. Many legislators in Mississippi will respond to constituent pressure in an election year and vote to maintain the present state of certain universities.[320] Former State Senator Robert Crook of Ruleville, Mississippi, established an eight member Senate committee to "study" higher education concerns.[321] Senator Crook focused his concern on his constituents who feared that MVSU and DSU may be merged or closed.[322] Less than two weeks after its formation, Crook, the committee chairman, told MVSU President William Sutton, "[y]ou can tell your students - in concrete - that it [MVSU] will be there."[323]

Within days of the Supreme Court's decision in *Fordice*, Governor Kirk Fordice established three advisory panels to develop possible solutions to the higher education quagmire in Mississippi.[324] Many criticized the Governor for not including more blacks or any of the plaintiffs on the advisory panels.[325]

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[317] SECRETARY OF STATE, 1988-1992, THE MISSISSIPPI OFFICIAL & STATISTICAL REGISTER 130.

[318] *Id.*

[319] *Id.*.

[320] Politics as usual has already begun in Mississippi. This became clear when the College Board revealed its proposal on October 22, 1992. The legislative Black Caucus and the House Speaker, Tim Ford, all agree that the State College Board Plan is not a viable solution. Andy Kanetnegiser, *Legislature Won't Approve, House Speaker Says of Move*, THE CLARION-LEDGER (Jackson, Miss.), Oct. 22, 1992, at 1A, col. 3.

[321] Andy Kanengiser, *Senate Panel Visits Worried Delta Schools*, THE CLARION-LEDGER (Jackson, Miss.), Aug. 1, 1992, at 1B.

[322] *Ayers, Another Group with Another Agenda*, THE CLARION-LEDGER (Jackson, Miss.), July 27, 1992, at 8A.

[323] Andy Kanengiser, *Senate Panel Visits Worried Delta Schools*, THE CLARION-LEDGER (Jackson, Miss.), Aug. 1, 1992, at 1B.

[324] Andy Kanengiser, *Fourth Panel Urged to End Segregation*, THE CLARION-LEDGER, (Jackson, Miss.), July 10, 1992, at 1A.

[325] *Id.*

As a result of this criticism, the Governor mentioned the possibility of creating a citizens task force comprised of people without political interests or ties to the lawsuit.[326]

The State College Board met with university presidents in an effort to develop a remedy.[327] Similarly, the Governor's office has organized several independent groups to meet and discuss possible remedies. None of these efforts are coordinated. For example, Governor Fordice said on C-SPAN that Jackson State University should be part of the overall solution.[328] On the same day, a Hattiesburg lawyer submitted a different restructuring proposal which the press labeled as "radical."[329] This proposal called for closing five universities and operating a University of Mississippi System with campuses located in Hattiesburg, Starkville and Jackson.[330] Others suggested a slightly different alignment or operating with as few as two schools or as many as four.

As this debate rages, a sub-issue simultaneously arises. How do the junior colleges fit into the overall higher education system? As a result of the uncertainty regarding the impact of the *Ayers* decision, the State's fifteen junior colleges are now in the process of asking the State Legislature to limit the ability of the eight universities to seek city and county funds for building and operating expenses.[331] The proposed legislation would prohibit the universities from obtaining local tax dollars with-

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[326] *Id.*

[327] *Ayers, Another Group With Another Agenda*, THE CLARION-LEDGER (Jackson, Miss.), July 27, 1992, at 8A.

[328] Cathy Hayden & Andy Kanengiser, *JSU Revitalization Key to Resolution of Ayers Suit, Fordice Tells Caller*, THE CLARION-LEDGER (Jackson, Miss.), Aug. 4, 1992, at 3B.

[329] *Id.*

[330] *Id.* Additional features of this plan submitted by Attorney Robert Marshall of Hattiesburg, included selling the closed campuses or using them for other needs like prisons or hospitals. The plan also called for moving the School of Pharmacy, School of Law, and the School of Education to Jackson. The proposal also indicated that the State should develop a football program in Jackson, basketball in Hattiesburg and baseball in Starkville. *Id.*

While the specifics of the proposal need significant work, I have spoken with many people who believe reducing the numbers of institutions in the state is a step in the right direction.

[331] Cathy Hayden, *Jr. Colleges Try to Lock Up Funding Turf*, THE CLARION-LEDGER (Jackson, Miss.), Aug. 3, 1992, at 1A.

out specific legislative approval. While on the surface, the issue appears to be a question of funding, the larger issue is in what form will the junior college system exist, if at all, under a restructuring? The junior colleges are attempting to preserve their existence through the funding mechanism. Currently, the State spends approximately $174 million dollars annually on the junior colleges and approximately $308 million annually on the universities.[332] What some junior college presidents may fear is the impact that *Ayers* restructuring will have on the mission of their institutions. These administrators are quick to point out that they educate more students than the eight universities.[333]

There does not appear to be any real consensus on a viable solution. There is neither a unified approach to study the problem nor has the State's leadership demonstrated a plan for consensus building that is likely to receive legislative support. Thus, the possibility of the Mississippi legislature developing a solution is unlikely.

C. The District Court

The solution may rest with Judge Biggers and the United States District Court for the Northern District of Mississippi. Although this may be judicially appropriate,[334] there are two reasons that the district court is not the most desirable place to

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[332] *Id.* at 7A; *see also* STATE BOARD FOR COMMUNITY AND JUNIOR COLLEGES, BUDGET REQUEST FOR FISCAL YEAR ENDING JUNE 30, 1994, 1, 1992. This figure includes $65 million from state appropriations, $20 million from indirect state appropriations, $10.5 million from federal sources, and $77 million from tuition and county support. The information on the four-year college appropriations is available at ANALYSIS OF OPERATING BUDGETS FOR FISCAL YEARS 1992-93, BOARD OF TRUSTEES FOR INSTITUTIONS OF HIGHER LEARNING 1 (1992).

[333] Lea Ann Brandon, *States 15 2-Year Colleges Caught in Budget Crunch*, THE CLARION-LEDGER (Jackson, Miss.), Dec. 10, 1992, at 7A. The junior college enrollment in 1991-92 was 69,085 compared to 58,662 for the four-year schools. STATE BOARD FOR COMMUNITY AND JUNIOR COLLEGE STATISTICAL DATA 1 (1991-92); INSTITUTIONS OF HIGHER LEARNING STATISTICAL EXPORT 1 (1992).

[334] After attending the hearing on October 22, 1992 in which it became clear to me that there was really no way for the parties to settle this lawsuit, I am now convinced more than ever that the district court needs to take an active role in the remedy stage. Judge Biggers should appoint a special master or group of experts to develop a plan that will be implemented.

restructure Mississippi's higher education. First, it is not unreasonable to assume that the same district court judge who initially dismissed the case against the State may find it difficult, even applying the Supreme Court's new standard, to find that the State perpetuated a dual system of education. Second, any remedy developed by the district court is a failure on the part of the people of Mississippi to take charge of their own future and to develop a system of higher education that represents the genuine product of the wishes and aspirations of all Mississippians. Nevertheless, the district court is the most likely forum to develop a reasonable solution to the higher education problems in Mississippi. Additionally, Judge Biggers should consider the use of a special master, someone who has expertise in the area, is objective and can offer a report to the judge which he can then accept or reject in whole or part.

D. Equity

A discussion of remedies should begin with a full appreciation of the equitable principles including right, justice, moral quality and flexibility. In England, the Court of Chancery provided "higher justice" and flexibility.[335] Often very creative and influential chancellors were responsible for this "higher justice." The chancellor's power included coercive, restitutionary, and declaratory remedies.[336]

The chancellors entered personal orders against an individual requiring performance or termination of a certain act and punished the individual for disobedience. The primary form of the personal order was the injunction by the courts of equity. A fundamental difference existed between judgments by the courts of equity and those by the courts of law upon one party's noncompliance. The judgment at law required enforcement of adjudicated legal rights if a party did not comply. However, a party's failure to comply with an equitable judgment resulted in immediate punishment.[337]

Declaratory and restitutionary remedies were other forms

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[335] DAN B. HOBBS, HANDBOOK ON THE LAW OF REMEDIES 24 (1973).
[336] *Id.* at 25.
[337] *Id.*

of relief available to the chancellor. Declaratory remedies were requested when parties sought a declaration of their rights, including claims for rescission or cancellation of a contract.[338] By contrast, a party sought a restitutionary remedy when he was deprived of something rightfully his and wished to have it restored to him.[339]

Because of the diverse and complex circumstances surrounding race relations, desegregation litigation is particularly suited to equitable relief. Equitable remedies require judgment and discretion in fashioning solutions to myriad local problems.

1. Early Desegregation Cases

While the law has clearly supported the broad authority of district courts in fashioning equitable relief, the breadth of this authority is controlled "by the nature and the extent of the constitutional violation."[340] In *Brown II*, the Court considered implementation of the desegregation mandate. However, the Court appreciated the need to address a variety of local school problems.[341] Additionally, the Court was sensitive to the need for local school authorities to undertake the primary responsibility in solving these problems.[342] As the Court grappled with implementation of the *Brown I* mandate,[343] the Supreme

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[338] *Id.* at 26.

[339] *Id.*

[340] Milliken v. Bradley, 418 U.S. 717, 744 (1974) [*Milliken I*].

[341] *Brown II*, 349 U.S. at 299; *see* Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 2 UCLA L. REV. 599-602 (1977). Professor Wasserstrom disputes the Court's explanation for its use of the "deliberate speed" language in *Brown II*. He says this rationalization by the Court is an example of "conceptual institutional racism." In his view, the Supreme Court Justices fell into this mindset, because they made assumptions regarding black schools and white schools that were "a significant feature of dominant racist ideology." Professor Wasserstrom says the Court could have required white children to attend black schools and black children to attend white schools the day after *Brown I* if it had wanted to. Instead, he said *Brown II* suffers from the racist ideology that the Court could not order white children to attend wretched black schools, especially when they had previously attended better schools. Thus, Wasserstrom indicts the whole notion that separate was ever equal. *Id.*

[342] *Id.*

[343] *Brown I*, 347 U.S. at 495-96. The Supreme Court applied *Brown* to higher education in 1955 in Board of Trustees v. Frasier, 350 U.S. 979 (1956), *aff'd per*

Court held:

> In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power.[344]

The federal courts have consistently applied equitable principles to a variety of local desegregation problems encountered over the years. In *Swann*, the Court granted certiorari to determine the duties of local school authorities and the power of the federal district court in eliminating a prior *de jure* segregated public school system.[345] *Swann* involved the desegregation of the City of Charlotte and the surrounding Mecklenburg County of North Carolina public school system. In North Carolina, two-thirds of the black students attended schools which were ninety-nine percent black.[346] The Court held that district courts have a broad range of alternatives in addressing the mandates of *Brown I* and *II*.[347] Those alternatives included the remedial altering of attendance zones and busing in order to accomplish the objective of dismantling the dual school system.[348]

Similarly, in *Milliken v. Bradley* (*Milliken I*),[349] the Supreme Court addressed for the first time the validity of a court ordered desegregation plan encompassing eighty-five school districts when the actual segregation existed in only one of the districts.[350] This interdistrict remedy was a direct result of a finding of *de jure* segregation in a City of Detroit school district.[351] The Supreme Court concluded that the lower court ex-

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curiam, 134 F. Supp. 589, 592 (M.D. N.C. 1955).

[344] *Brown II*, 349 U.S. at 300.

[345] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 5-7 (1971)

[346] *Swann*, 402 U.S. at 7.

[347] *Id.* at 15-16.

[348] *Id.* at 27-31.

[349] 418 U.S. 717 (1974).

[350] *Milliken I*, 418 U.S. at 744.

[351] *Id.* at 745; *see* Angela G. Ballentine, Note, *School Desegregation: An Encore of Separate But Equal*—Jenkins v. Missouri, 20 CREIGHTON L. REV. 1055 (1987) (containing good discussion of *Milliken I* standard and its subsequent application).

ceeded its equitable powers by imposing an interdistrict remedy affecting suburban school districts when *de jure* segregation existed only in the Detroit city schools. Furthermore, the Court held:

> The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.
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> The record before us, voluminous as it is, contains evidence of *de jure* segregated conditions only in the Detroit schools; indeed, that was the theory on which the litigation was initially based and on which the district court took evidence. With no showing of significant violation by the 53 outlying school districts and no evidence of any interdistrict violation or effect, the court went beyond the original theory of the case as framed by the pleadings and mandated a metropolitan area remedy. To approve the remedy ordered by the court would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in *Brown I* and *II* or any holding of this Court.[352]

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[352] *Milliken I*, 418 U.S. at 744-45.

The Court in *Milliken I* clearly held that equitable remedies were broad, but not unbridled. Therefore, the Court stated that the constitutional violations must be shown as spanning several districts to impose an interdistrict segregation remedy.[353] Nevertheless, in *Milliken v. Bradley (Milliken II)*,[354] the Supreme Court granted certiorari to consider again the scope of the district court's equitable powers and to address two questions. First, could the district court order remedial educational programs for students who attended a school system previously supporting *de jure* segregation?[355] Second, could a federal court require state officials who violated the Constitution to assume the cost of such remedial programs?[356]

In deciding for the first time if district courts could order the adoption of remedial education programs in a school desegregation decree,[357] the Supreme Court followed the guidance of *Brown II* and *Swann*.[358] In addition, the Court required the federal courts, when applying equitable principles, to focus on three factors.[359] First, the nature of the remedy is determined by the nature of the constitutional violation.[360] Second, the

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[353] *Id.* at 745.

[354] 433 U.S. 267 (1977) [*Milliken II*].

[355] *Milliken II*, 433 U.S. at 269.

[356] *Id.*

[357] *Id.* at 279.

[358] *Id.* at 279-80.

[359] *Id.* at 280.

[360] *Milliken II*, 433 U.S. at 281-82. The Court elaborated on the equitable principle that the nature of the remedy which must follow the nature and scope of the constitutional violation. The Court said:

> The well-settled principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the constitution or does not flow from such a violation, or if they are imposed upon governmental units that were neither involved in nor affected by the constitutional violation . . . [b]ut where, as here, a constitutional violation has been found, the remedy does not "exceed" the violation if the remedy is tailored to cure the "condition that offends the Constitution".

Id. at 282.

court's solution must be remedial in nature.[361] Third, the federal courts must devise a remedy consistent with the Constitution that incorporates the interests of state and local authorities in managing their own affairs.[362] Applying these principles in *Milliken II*, the Court concluded that the district court did not exceed its discretion by requiring the school district to develop remedial educational programs and to bear the cost of those programs.[363]

2. *Modern Desegregation Cases*

a. Missouri v. Jenkins

The modern cases consistently have followed early precedent. Recently, in a unanimous opinion, *Missouri v. Jenkins*,[364] the United States Supreme Court reversed in part and affirmed in part the United States District Court for the Western District of Missouri which required the Kansas City, Missouri School District (KCMSD) to increase property taxes in order to fund desegregation of the KCMSD's public schools. The State argued that the district court abused its discretion by imposing a tax increase rather than requiring the local tax authority to increase taxes. The Supreme Court granted certiorari to determine if the district court's imposition of a tax increase was an abuse of discretion.[365] In *Jenkins*, a group of KCMSD students alleged that the KCMSD operated a segregated public school system.[366] After a hearing, the district court ordered the school district to take certain steps to desegre-

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[361] *Id.*

[362] *Id.* at 280-81.

[363] *Id.*; *see also* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976). The district court required the Pasadena school district to make adjustments annually in order to ensure that there would be no school with a majority of any minority students. *Id.* at 428. The Supreme Court held that the district court exceeded its authority by requiring the school officials to make year-by-year adjustments to the racial composition of student bodies even though shifts in racial makeup resulted from changes in residential demographics. *Id.* at 434-35.

[364] 495 U.S. 33 (1990).

[365] *Jenkins*, 495 U.S. at 37.

[366] *Id.*

gate,[367] including the improvement of the quality of the curriculum and library, the reduction of teaching loads and adoption of tutorial, summer school and child development programs.[368] Moreover, the district court ordered capital improvements, voluntary interdistrict transfer of students and additional programs aimed at reducing class size. The total cost for this desegregation remedy was estimated at approximately eighty-eight million dollars over three years. The district court expected the State to pay three-fourths of the total cost and the KCMSD to pay the remaining one-fourth.

However, the Missouri Constitution prevented the KCMSD from paying the full share of its obligation by limiting local property taxes to $1.25 per $100 of assessed valuation, unless a majority of the voters in the district approved an increase up to $3.25 per $100. The increase could exceed $3.25 per $100 only if two-thirds of the voters approved the increase. In addition, the Hancock Amendment operates to maintain property tax rates even when real property is assessed at a higher valuation.[369]

Although the district court supported a tax to aid in desegregation,[370] the district court enjoined the operation of Proposition C to allow the KCMSD to raise an additional four million dollars for the coming year.[371] Proposition C raised revenue by allocating one cent of every dollar raised by the state sales tax to a school trust fund.[372] This allowed school districts to reduce property taxes by fifty percent of the previous year's sales tax receipts.[373] The injunction imposed on Proposition C allowed the school district to charge the full amount of the tax due on the assessed property and thereby increase revenue received from property taxes. In order to pay its share of the desegregation remedy in the following years, the district court required the KCMSD to submit a proposal to the voters for a

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[367] *Id.* at 37-38.
[368] *Id.* at 38 n.4.
[369] *Id.* at 38-39.
[370] *Jenkins*, 495 U.S. at 38-39.
[371] *Id.*
[372] *Id.* at 1656.
[373] *Id.*

tax increase.[374] The Eighth Circuit Court of Appeals however, did not agree that the district court had adequately explained why it required the State to bear most of the cost of the desegregation plan.[375] Thus, the appellate court ordered the lower court to divide the cost equally between the State and KCMSD.[376]

Because the voters refused to approve a tax increase, funding for desegregation remained a problem.[377] In an effort to alleviate this problem, the district court developed a plan to operate "magnet schools" to better integrate the public schools in the district.[378] The district court continued the injunction against Proposition C to allow KCMSD to raise additional revenue.[379] The district court then developed a plan that would require the State to pay seventy-five percent and KCMSD twenty-five percent of the cost of the remedial plan.[380] The district court stated it was not equitable to require the KCMSD to pay one-half of the cost of desegregation.[381] As the cost of the desegregation remedy increased KCMSD lacked the resources to pay its twenty-five percent share of the desegregation cost.[382] Recognizing the financial instability, KCMSD asked the court to order the State to pay any amount which KCMSD could not afford. The district court refused to grant the order but recognized that KCMSD exhausted its available means of raising money.[383] Therefore, the district court ordered KCMSD to raise property taxes from the current $2.05 per $100 of assessed valuation to $4.00 per $100.

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[374] *Id.*

[375] *Jenkins*, 495 U.S. at 1656.

[376] Jenkins v. Missouri, 807 F.2d 657 (1986), *cert. denied*, 484 U.S. 816 (1987).

[377] *Jenkins*, 495 U.S. at 40.

[378] *Id.* Magnet schools attract students attending private and other public schools because of the unique high quality program offerings. *Id.*; *see* Janet R. Price & Jane R. Stern, *Magnet Schools as a Strategy for Integration and School Reform*, 5 YALE L. & POL'Y REV. 291 (1987).

[379] *Jenkins*, 495 U.S. at 40.

[380] *Id.* at 41.

[381] *Id.* at 40.

[382] *Id.* at 41.

[383] *Id.*

The State appealed the tax increase and the cost allocation between it and KCMSD.[384] The Eighth Circuit upheld the district court's determination of cost allocation and the broad scope of the desegregation order.[385] While the appellate court agreed with the district court's authority to order a tax increase, the appellate court determined that principles of federal/state comity required "minimally obtrusive methods to remedy constitutional violations."[386] As such, the appellate court held that the district court could authorize the KCMSD to submit the increase to the state tax collection authorities, but the court could not set the property tax rate.[387]

The Supreme Court acknowledged that while the equitable powers of the district court are broad, they are not unlimited and do not include the power to impose a tax increase on local authorities.[388] The Court held the district court circumvented local authority by imposing the tax itself and a less drastic alternative existed, such as, requiring the school district to levy property taxes. In addition, the lower court could have enjoined the operation of the state laws preventing the school district from increasing taxes in an amount necessary to fund the desegregation remedy. Therefore, the Supreme Court concluded that the district court abused its discretion and reversed the appellate court to the extent the decision approved the district court's ability to increase tax revenues.[389]

However, the Supreme Court affirmed the district court's equitable power of injunction to allow the local government to levy taxes above the limit set by state law. The Supreme Court held when the reasoning for not observing the statutory limitation imposed by a state is based on the Constitution, the Supremacy Clause appropriately suspends the operation of that state statute.[390] The Court said:

> [H]owever wide the discretion of local authorities in fashion-

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[384] *Jenkins*, 495 U.S. at 42.
[385] *Id.*
[386] *Id.* at 33.
[387] *Id.*
[388] *Id.* at 51.
[389] *Jenkins*, 495 U.S. at 52.
[390] *Id.* at 57.

> ing desegregation remedies may be, if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees.[391]

While acknowledging the district court's broad equity powers, the Supreme Court limited those powers when they interfered with federal and state comity.

b. United States v. Louisiana

Another recent decision that may prove instructive as the parties search for remedies in *Ayers* is *United States v. Louisiana.*[392] In *Louisiana*, the district court employed a Special Master to provide a resolution for the dual educational system that existed in Louisiana.[393] Similar to Mississippi and the *Ayers* litigation, Louisiana also had an over abundance of seventeen universities governed by four separate boards of higher education.[394] Like Mississippi, several state universities were originally established as black-only institutions and others were established as white-only institutions.[395] While passage of the 1964 Civil Rights Act was intended to remove institutional racial identifiability, the institutions continued to be

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[391] *Id.* (quoting North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971)).

[392] 718 F. Supp. 499 (E.D. La. 1989), *appeal dismissed*, 493 U.S. 1013 (1990); *see* United States v. Louisiana, 692 F. Supp. 642 (E.D. La. 1988) (prior case history); United States v. Louisiana, 751 F. Supp. 606 (E.D. La. 1990) (subsequent case history); United States v. Louisiana, 751 F. Supp. 621 (E.D. La. 1990) (subsequent case history).

[393] *Louisiana*, 718 F. Supp. at 502-03.

[394] *Id.* at 502. The Board of Regents plans and coordinates the budgets and program offerings of all state universities. The Louisiana State University Board of Supervisors (LSU Supervisors), Southern University Board of Supervisors (Southern Supervisors), and the Board of Trustees for State Colleges and Universities (Trustees) all had direct management authority for several of the seventeen state universities. *Id.*

[395] *Id.* at 503.

racially identifiable.[396] The enrollment figures at universities within close proximity to each other belied any claim of an integrated university.[397] Moreover, the governing boards of the universities were also racially identifiable.[398] The Court concluded that the Louisiana scheme for governing education perpetuated segregation.[399] The predominantly black institutions (PBIs) continued to educate more than fifty percent of the black students who entered college.[400] Most disturbing was the fact that while more blacks were entering higher education, the percentage of those educated at PBIs as compared to predominantly white institutions (PWIs) increased.[401] The district court in the *Louisiana* case decided to reserve the remedy of merger because of the many problems attendant to it such as merging students of highly disparate academic backgrounds, potential loss of qualified faculty, and the possible loss of capable administrators who were attracted to certain schools because of its unique characteristics.[402] While a merger was not viewed as appropriate for the university community at this time, it was initially considered appropriate for legal education.[403] However, because of the integration process at both law schools between 1984 and 1992, the Court subsequently modified its merger requirement.[404]

The plaintiffs in the *Louisiana* litigation like those in *Ayers* requested additional money for enhancement.[405] However, the

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[396] *Id.* at 504.

[397] *Id.* at 504.

[398] *Louisiana*, 718 F. Supp. at 504. Approximately 80% of the membership on the Board of Regents was white and 20% black. The LSU Supervisors reflected a 78% white and 22% black ratio. The Southern Board of Supervisors has 22% white and 78% black composition. The Trustees membership reflects a 72% white and 28% black racial composition. *Id.*

[399] *Id.* at 505.

[400] *Id.* at 507.

[401] *Id.*

[402] *Id.*

[403] *Louisiana*, 718 F. Supp. at 507.

[404] United States v. Louisiana, No. CIV.A. 80-3300, 1992 WL 407330 (E.D. La. Dec. 23, 1992).

[405] Gunnar Myrdal, in his book *An American Dilemma*, presents a detailed explanation of the historical inequities between blacks and whites in education. Dr. Myrdal was a Swedish scholar who had at a very young age achieved an interna-

district court in *Louisiana* said it was troubled by the implication that the PBIs may be more intent on preserving their mission of educating black students than providing expanded opportunities for white students.[406] Thus, the court focused on a remedial plan that would improve the ability of PBIs to educate both black and white students.[407] The district court in *Louisiana* expressed that it was critical that PBIs be upgraded in order to attract white students.[408] The *Louisiana* court thought tiering would be helpful as it attempted to produce a better educated student population. Thus, the State adopted an approach providing Louisiana State University (LSU) as the flagship university with selective admissions standards.[409] The second tier of institutions would house most of the state's doctoral programs.[410] The third tier of schools would be comprehensive four-year colleges but would not offer doctoral programs.[411] The Special Master's recommendations also included the development of a community college system as an important part of its higher education structure.[412] The obvious purpose of tiering was to reduce program duplication.[413]

The Special Master recommended an organizational structure for higher education in Louisiana that would be governed by a single University of Louisiana Board. The chief executive

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tional reputation as a social economist, was a professor at the University of Stockholm, an economic advisor to the Swedish government, and a member of the Swedish Senate. His book was sponsored by the Carnegie Corporation as part of its mission to collect, analyze, and interpret existing information. The Founder of the Corporation, Andrew Carnegie, had an abiding interest in the African-American and was closely associated with the Hampton and Tuskegee Institutes. The study was undertaken when a new board member in 1931 suggested that the "Negro Problem" in America be studied in order for the corporation to intelligently distribute its own funds. A decision was made to import a scholar in order that the study could be approached with a fresh mind uninfluenced by traditional American racial attitudes. GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY at xiviii (1944).

[406] *Louisiana*, 718 F. Supp. at 508.

[407] *Id.*

[408] *Id.*

[409] *Id.* at 509.

[410] *Id.*

[411] *Louisiana*, 718 F. Supp. at 509.

[412] *Id.* at 510.

[413] *Id.* at 509.

officer would be the president of the system with two vice presidents, one for desegregation compliance and one for community colleges.[414] The report submitted by the Special Master was adopted, for the most part, by the district court.[415] An essential aspect of the Special Master's proposed reorganization was the minimization of program duplication,[416] which contributes to racial identifiability and increased expenses.[417] Thus, the district court concluded that one of the new board's first missions would be the "reduction of duplicated programs, especially where they involve proximate institutions."[418]

The Special Master saw legal education as a problem area for the State of Louisiana. Both of the state supported law schools are in Baton Rouge; Southern Law Center (SLC) is predominantly black and Louisiana State University Law School (LSU) is predominantly white.[419] LSU is a more successful law school based on the bar passage rates, but most black Louisiana lawyers are educated at SLC.[420] The difficulties of institutional merger that faced the rest of the Louisiana higher education system did not face the law schools because of their proximity and almost identical programs.[421] Thus, the Special Master determined that the impact of the disparity between the schools would fall disproportionately on the black law students.[422] Therefore, the Special Master recommended that the law schools merge over a five year span.[423]

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[414] *Id.* at 512.
[415] *Id.* at 500.
[416] *Louisiana*, 718 F. Supp. at 513.
[417] *Id.*
[418] *Id.*
[419] *Id.*
[420] *Id.*
[421] *Louisiana*, 718 F. Supp. at 513.
[422] *Id.* at 514.
[423] *Id.* The merger recommendation was modified by the district court's order of December 23, 1992. United States v. Louisiana, No. CIV.A. 80-3300, 1992 WL 407330 (E.D. La. Dec. 23, 1992). The district court issued this order after the Supreme Court's decision in *Fordice*. With respect to the modification of the law school merger plan, the Louisiana district court stated:

> Since the Court's original opinion, regarding remedy, the state has introduced evidence concerning recent developments at the LSU and Southern law centers, which leads the Court to conclude that the "drastic"

The district court declined to adopt a remedy that required a specific dollar enhancement. The Court agreed that funding decisions needed to be consistent with the desegregation goals of the Special Master's plan.[424] Additionally, the Special Master recommended establishing a monitoring committee to ensure that the State took appropriate steps to achieve the desegregation goals.[425]

Pursuant to the Special Master's Final Report as modified, the district court announced several requirements: the creation of a single governing board,[426] the classification of state universities with selected missions,[427] the development of selective admissions standards rather than open admissions,[428] the

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remedy of merger, as prescribed in the Court's original remedial plan, would now be inappropriate.

In recent years, the state has made ample efforts to improve the quality of education at Southern Law Center and has also laid some of the foundations necessary to the successful integration of the LSU Law Center. As to Southern Law Center, the evidence submitted to the Court demonstrated that: (1) the school is fully integrated with a current student racial composition of 53% blacks and 47% whites; (2) the student/faculty ratio, 17:1, is within acceptable limits; (3) there has been a marked improvement in the bar passage rate among Southern law students; (4) the library facilities are in compliance with ABA standards; and (5) the physical facilities are undergoing extensive renovation. *See* Affidavit of Chancellor B.K. Agnihotri, R. Doc. No. 606. As to LSU Law Center, the evidence submitted demonstrated that: (1) there was a 3.6% increase in black student enrollment between 1988 and 1991; (2) financial grants and tuition waivers for black students have increased substantially; and (3) recruitment efforts of black students both within and outside the state have been expanded. *See* Affidavit of Chancellor Winston R. Day, R. Doc. No. 592. As stated previously, the Court commends the state and the administrators at the respective schools with regard to these improvements. Additional remedial steps, as specified in the remedial plan at 126, are, however, warranted to ensure a continued and sustained effort on the part of the state.

United States v. Louisiana, No. CIV.A. 80-3300, 1992 WL 407330, at *51-52 (E.D. La. Dec. 23, 1992).

[424] *Id.*

[425] *Id.*

[426] *Louisiana*, 718 F. Supp. at 515.

[427] *Id.* at 516.

[428] *Id.* at 517.

development of a comprehensive community college system,[429] a comprehensive review by the Board president of duplicated programs,[430] the development of race recruitment and retention programs[431] and the establishment of a monitoring committee to monitor progress toward desegregation.[432]

The district court in *Louisiana* recognized that it had the broad authority to order a merger of the entire university system[433] but thought that its tiering approach was better.[434] Additionally, the district court established a monitoring committee over which the court would maintain jurisdiction.[435] When the Fifth Circuit Court of Appeals decided in *Ayers*[436] that Mississippi had met its constitutional duties by adopting race-neutral admissions policies Judge Schwartz's 1989 order

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[429] *Id.* at 518.

[430] *Id.* at 519.

[431] *Louisiana*, 718 F. Supp. at 519.

[432] *Id.* at 520.

[433] *Id.*; *see also* Geier v. University of Tenn., 597 F.2d 1056, 1069 (6th Cir.), *cert. denied*, 444 U.S. 886 (1979) (stating that "district court's equitable power is broad enough to encompass a merger order").

[434] United States v. Louisiana, 718 F. Supp. 525, 534 (E.D. La. 1989).

[435] *Louisiana*, 718 F. Supp. at 521. The extent of a district court's continuing jurisdiction was discussed in Freeman v. Pitts, 112 S. Ct. 1430 (1992). In *Freeman*, the DeKalb County, Georgia, school system filed a motion for final dismissal of the litigation. The school district sought a declaration that it had achieved unitary status. The district court said that the school district had met four of the six *Green* factors. Thus, the Court declined to dismiss the case but indicated that it would order no further relief in the areas of student assignment, transportation, physical facilities, and extracurricular activities. However, regarding the remaining *Green* factors, faculty assignments and resource allocation, the Court concluded that the school district was not unitary. The district court then ordered the school district to take steps to address the remaining problems. *Id.* at 1436-37. The court of appeals reversed, holding that the district court could not retain only partial authority but must retain full authority until all of the *Green* factors are met and the school district is in complete compliance with a unitary system. *Id.* at 1448-49. The Supreme Court reversed, holding that a district court has the authority to relinquish supervision over a school district in incremental stages before full compliance has been achieved. *Id.* at 1449; *see also* Board of Educ. v. Dowell, 498 U.S. 237 (1991). In *Dowell*, the court of appeals required the school district to show that maintaining a desegregation decree would constitute a grievous wrong. Until such a showing was made, the decree remained in effect. The Supreme Court reversed, holding that a finding by the district court that the school district was in compliance with the constitution would be sufficient to justify dissolution of the desegregation decree. *Id.*

[436] Ayers v. Allain, 914 F.2d 676 (5th Cir. 1990).

was effectively overturned. However, after the Supreme Court decision in *Fordice*, Judge Schwartz required the parties to show cause why he should not reimpose his 1989 order. Thus, on December 23, 1992, Judge Schwartz effectively reimposed his 1989 order but without the law school merger requirement.[437] Given the lack of any common ground between the parties in *Ayers*, Judge Biggers could benefit from the use of a special master or experts as Judge Schwartz used in the *Louisiana* litigation. The *Louisiana* decision also requires the implementation of several desegregation approaches that could prove feasible in Mississippi.[438]

c. Knight v. Alabama

Another recent decision from the United States District Court for the Northern District of Alabama mirrors the *Ayers* litigation and should be instructive as the parties discuss possible solutions to the dual higher education system in Mississippi. In *Knight v. Alabama*,[439] decided in December 1991, Judge Harold L. Murphy's[440] 365 page opinion is an excellent example of a district court opinion that reflects meticulous attention to the law, thoughtfulness in approach, painstaking attention to detail and active judicial participation. The *Knight* litigation is factually almost identical to the *Ayers* case. Alabama has sixteen publicly supported four-year institutions of higher learning that grant bachelor's degrees and thirty-nine two-year public institutions of higher education that do not grant bachelor's degrees.[441] The four-year schools enroll approximately 124,000

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[437] United States v. Louisiana, No. CIV.A. 80-3300, 1992 WL 407330 (E.D. La. Dec. 23, 1992).

[438] *Id.* Proposals regarding a comprehensive community college system, program transfer and enrollment management, scholarships for other race students, other race admissions officers, public information efforts, and developing relationships between high schools and colleges. *Id.* at *28-35.

[439] 787 F. Supp. 1030 (N.D. Ala. 1991).

[440] *Knight*, 787 F. Supp. at 1050. Judge Murphy was specially assigned to hear this case after six other district judges were recused on their own motion or by the Eleventh Circuit. Judge Murphy is a district court judge for the Northern District of Georgia. *Id.*

[441] *Id.* at 1061-63.

students and the junior colleges enroll approximately 73,000 students.[442] Of the sixteen four-year schools, two have been historically black (HBU), Alabama State University (ASU) and Alabama A&M University (AAMU), and the remainder have been historically white (HWU).[443] Litigation began in 1978 when the Office of Civil Rights for the United States Department of Health, Education and Welfare began an investigation of the Alabama system of higher education.[444] At that time the Assistant Secretary of Civil Rights for the Department of Education was Clarence Thomas, now Associate Justice Thomas, who attempted to engage in negotiations with Alabama Governor Fob James.[445] The negotiations proved unsuccessful and the former Assistant Secretary, Clarence Thomas, sent a ten-page letter to Governor James requesting that the State submit a plan to eliminate the vestiges of the dual system, or the case would be referred to the Department of Justice for litigation.[446] In 1983, the Department of Justice filed a complaint in the Northern District of Alabama, alleging that the State of Alabama continued to maintain vestiges of *de jure* segregation in public higher education.[447]

However, two years earlier, in 1981, John F. Knight, Jr., an alumnus of ASU filed an action on behalf of himself, alumni, students and faculty of ASU alleging that Alabama continued to maintain a dual system of public higher education.[448] Before the trial began in 1985, the district court permitted the intervention of additional plaintiffs, allowing ASU and AAMU to realign themselves as plaintiffs and recused several judges.[449]

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[442] *Id.*

[443] *Id.* at 1062-63. Judge Murphy presented an at length discussion of African-Americans' early efforts to establish colleges. *Id.* at 1074-89.

[444] *Id.* at 1047.

[445] *Knight*, 787 F. Supp. at 1048.

[446] *Id.*

[447] *Id.*

[448] *Id.* The action began as Knight v. James, 514 F. Supp. 567 (M.D. Ala. 1981). The Justice Department's case was originally captioned United States v. Alabama, 571 F. Supp. 958 (N.D. Ala. 1983).

[449] *Knight*, 787 F. Supp. at 1048. The statement of the case provides a complete procedural history. *Id.* at 1047-51.

The contentions of the parties in *Knight* are similar to those in the *Ayers* case. The *Knight* plaintiffs argued that Alabama maintained an official state policy of white supremacy and that the current institutional structure and policies reflected Alabama's design to subordinate black citizens.[450] The *Knight* plaintiffs contended that the overall white supremacy policy has been historically implemented in the missions of the HBUs as compared to the HWUs. History demonstrates the creation and expansion of branch campuses in Montgomery and Huntsville was to the detriment of the HBUs in close proximity to HWUs. However, inequities are apparent when viewed in light of minority student enrollment statistics, minority faculty and staff employment, facility funding and program duplication between HBUs as compared with HWUs.[451] The United States basically contended that the vestiges of the prior *de jure* system remain[452] and that the State of Alabama had not disestablished the dual system of higher education. The Government argued that the State had hindered the black schools from attracting white students and white schools from attracting black students in a range of areas including disparate institutional funding practices and program duplication.[453]

The defendants contended they fulfilled the constitutional and statutory obligation to eradicate the vestiges of segregation. They argued that institutional differences were the result of different missions rather than vestiges of *de jure* or *de facto* segregation.[454]

The trial began in October 1990 and continued uninterrupted until April 16, 1991. Judge Murphy heard 200 witnesses and received hundreds of thousands of pages of exhibits.[455] The transcript of the proceedings is approximately 22,000 pages.[456] Judge Murphy's opinion is a detailed history of education in Alabama during the Antebellum and the Reconstruction

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[450] *Id.* at 1051.
[451] *Id.* at 1052-53.
[452] *Id.* at 1053.
[453] *Id.* at 1054.
[454] *Knight*, 787 F. Supp. at 1055.
[455] *Id.* at 1051.
[456] *Id.*

periods. He discussed the impact of disenfranchisement on black education, the use of the ACT and heightened admissions requirements, the role of the HBUs in the Civil Rights Movement, the history of the branch campus development, the history of the State Commission on Higher Education, the history of the land grant system in Alabama, the current admissions standards, the racial composition of faculty and administrative positions, the state funding for higher education, the adequacy of campus facilities at the HBUs, the student choice in enrollment decisions, the racial composition of the State's colleges and universities, the undergraduate and graduate recruitment and retention policies, the institutional classification and program approval system, the program duplication, the racial climate at the HWUs, and multiculturalism in the universities. In short, as Judge Murphy reviewed the history of education in Alabama, he left nothing to the reader's imagination.

Judge Murphy concluded that Alabama has historically operated and continues to operate a dual system of public higher education:

> [V]estiges remain within the practices of some Defendants in the following areas: faculty and administrative employment, state funding for higher education, facilities on the HBUs, admissions policies, and program duplication.[457]

Judge Murphy made the point that the cumulative educational deficit of the last three hundred years cannot be alleviated overnight; changing the reality of Alabama's discriminatory history will take time. Moreover, changing the perceptions may take even longer. Judge Murphy stated:

> [I]t takes a long, long time to turn an institution around, not only in reality, but even in the perceptions that people have of the place, how attractive it will be to students who have known historically that an institution has been under funded, has been in comparative terms low quality.[458]

The district court found a lack of effort by Alabama to over-

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[457] *Id.* at 1368.
[458] *Id.* at 1227.

come the years of discriminatory funding of the HBUs.[459] The funding levels of the two HBUs were insufficient to provide for an education to overcome the discriminatory past and to free the students from a discriminatory stigma as they attended classes in inadequate facilities.[460]

The Alabama district court saw the real issue in this case as not the constitutional duty of the State, but rather, the "nature of the remedial obligation necessary to conform one's practices with that duty."[461] Judge Murphy pointed out that when the defendants quarrel about whether the duty to remedy *de jure* segregation extends to its vestiges root and branch, the debate actually involves whether the curative standard used in elementary and secondary education cases applies in the higher education context.[462]

Similarly, the plaintiffs contended that the root and branch principle applied without regard to the unique characteristics of higher education.[463] Judge Murphy held:

> [I]n the area of public education, discrimination based upon race is inherently unconstitutional. It is this doctrine that is the constitutional imperative, the pole star which must guide the Court's deliberations . . . . The doctrine is silent, however, on the remedy required to achieve the objective. The Supreme Court has decided that the objective is achievable by the elimination of discrimination, root and branch, to the extent possible. The root and branch requirement is not a constitutional imperative in the same sense as the maxim set forth in *Brown I*, but rather, a principle that must be applied in formulating a remedy if a public educational institution is found to either be acting in a discriminatory manner, or if vestiges of the prior *de jure* system impede desegregation. *To the extent the root and branch requirement is fact specific, there is within its ambit, ample room to accommodate the unique characteristics of higher education.*[464]

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[459] *Knight*, 787 F. Supp. at 1270.
[460] *Id.* at 1271.
[461] *Id.* at 1354.
[462] *Id.*
[463] *Id.*
[464] *Knight*, 787 F. Supp. at 1354 (emphasis added).

Judge Murphy clarified the real question as not the constitutional duty owed, but the degree of flexibility available in providing a remedy for a violation of the constitutional duty in the context of higher education.

Judge Murphy examined the *Brown I* and *II* cases and the *Milliken I* and *II* cases and found:

> The court's declaration in *Brown I* applies to all dual systems of public schooling regardless of whether the system provides primary, secondary, or higher education. It is universally recognized that a state which has operated a racially dual system of public education is under a constitutional obligation to end racial distinctions and dismantle its dual system.[465]

Brown I did not address the question of remedy that was left for reargument in *Brown II*. In *Brown II*, the Supreme Court "elected the gradual method of effectuating the mandate of *Brown I* and left it to the courts of first instance to define the parameters of the relief necessary to bring school systems into

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[465] *Id.*; *see* Geier v. University of Tenn., 597 F.2d 1056, 1065 (6th Cir. 1979), *cert. denied*, 444 U.S. 886 (1979). The *Geier* court held where an open admissions policy does not produce desegregation, something more is required. In *Geier*, the university appellants attempted to distinguish *Green* because it involved a freedom-of-choice plan in an elementary school. The court said:

> [T]he appellants argue that *Green* and similar decisions apply only to elementary and secondary education, not to public higher education. *Green* was concerned with whether a violation which continued after a freedom-of-choice plan was initiated required affirmative action. We conclude that the *Green* requirement of an affirmative duty applies to public higher education as well as to education at the elementary and secondary school levels. We agree with the court in *Norris v. State Council*, [327 F. Supp. 1368, 1373 (E.D. Va.) *aff'd sub nom.* Board of Visitors of the College of William & Mary v. Norris, 404 U.S. 907 (1971)], that "the state's duty is as exacting' to eliminate the vestiges of state-imposed segregation in higher education as in elementary and secondary school systems; it is only the means of eliminating segregation which differ. [*Norris*, 327 F. Supp. at 1373].

Geier, 597 F.2d at 1065; *see* Comment, *Integrating Higher Education: Defining the Scope of the Affirmative Duty to Integrate*, 57 IOWA L. REV. 898 (1972) (excellent discussion of the *Norris* decision); *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 244-77 (1962); RICHARD KLUGER, SIMPLE JUSTICE (1975) (detailed analysis of the history of the *Brown* decision).

compliance with the Constitution."[466] Judge Murphy concluded that the Constitution required Alabama to eliminate the vestiges of discrimination, root and branch, to the extent practicable. The district court relied on *Dowell*, which explained that, when determining whether a school board has complied in good faith with a district court's desegregation decree, the inquiry is whether the vestiges of past discrimination have been eliminated to the extent practicable.[467]

Significantly, the Alabama district court's legal analysis is consistent with the Supreme Court's *Fordice* decision.[468] Judge Murphy correctly identified the erroneous reasoning of the Fifth Circuit in *Ayers* before the Supreme Court issued its deci-

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[466] *Knight*, 787 F. Supp. at 1355.

[467] *Id.* (quoting *Dowell*, 111 S. Ct. at 637-38).

[468] *Knight*, 787 F. Supp. at 1358. Judge Murphy summarized his interpretation of the state's duty in the following passage:

> [F]undamental constitutional principles do not vary with the nature of the activity. A college student is no less entitled to attend a non-racially segregated state institution than is a secondary school student. State action which encourages the racial identity of an institution is simply unconstitutional.
>
> The Defendants would identify the issue in this case as being whether the state supported institutions have adopted race neutral practices, irrespective of whether there remain in place vestiges of the legalized era of discrimination that continue to have an impermissible impact based upon race. The error of the Defendants is that they confuse the duty to disestablish vestiges of *de jure* segregation with the means of achieving that disestablishment.
>
> This Court cannot conclude as the Defendants would have it do, that the standard for determining if a state has dismantled a racially dual school system differs depending on whether the system involves primary, secondary, or higher education. In each of these contexts, the inquiry is the same: has the state and its institutions ceased intentionally discriminatory conduct and adopted race neutral practices, and also, have they eliminated to the extent possible the vestiges of the prior dual system of discrimination, root and branch. Within this standard there is abundant room to provide for the dissimilarities between the various educational services provided by the state, and the necessity of institutional diversity at the college level. Well established remedial principles require this Court to address the continuing effects of *de jure* segregation and "correct, by a balancing of the individual and collective interests, the condition that offends the Constitution."

Id. at 1357-58 (quoting *Swann v. Board of Educ.*, 402 U.S. 1, 16 (1971)).

sion.[469] In *Knight*, Judge Murphy concluded his analysis of the Fifth Circuit's *Ayers* decision with the following statement from Judge Higginbotham's dissent:

> [H]aving openly discriminated in the delivery of educational services in virtually all its operations, Mississippi remains under a duty not to perpetuate segregation by its policies . . . . A state violates its duty to undo its wrong when it makes decisions that directly reinforce the historical traces of separate post-secondary educational paths for blacks and whites . . . . This analysis highlights the importance of segregative effects and locates the essential causal relationship between a past *de jure* dual system and a present de facto one . . . . [I]t recognizes that the affirmative duty to undo is confronted in the ongoing administration of the schools.[470]

Judge Murphy's decision emphatically states that "a wave of the magic wand of student choice" does not address all State obligations to disestablish vestiges of *de jure* segregation.[471] While the court acknowledged that the State progressed, there remained vestiges of a segregated culture that impeded and restricted the exercise of student choice.[472] Judge Murphy concluded that while the existence of student choice in higher education is obvious, that choice must be real and not theoretical.[473] Thus, the State must eliminate all vestiges of segregation that continue to impermissibly impede the exercise of student choice to the extent practical.[474]

The remedies fashioned to address the court's factual findings and legal conclusions are among some of the most creative of any of the district court opinions discussed. Judge Murphy relied on *Brown II* and *Milliken II* to establish the scope of the

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[469] *Knight*, 787 F. Supp. at 1354.

[470] *Id.* at 1359.

[471] *Id.* at 1359-60.

[472] *Id.* at 1360.

[473] *Id.*

[474] *Knight*, 787 F. Supp. at 1360. The district court also concluded that the defendants had violated Title VI of the Civil Rights Act, 42 U.S.C. § 2000(d), to the extent that those provisions make it unlawful for any person to discriminate under any program or activity receiving federal financial assistance. *Knight*, 787 F. Supp. at 1361-65.

court's remedial power. These cases stand for the proposition that the remedy must be no broader than the constitutional injury. The cases require the judicial decree to address the particular violation with narrowly tailored remedies. Thus, this principle is the key limitation on any district court's equitable powers.[475] With these equitable jurisprudential limitations in mind, Judge Murphy fashioned a broad based remedy that looked to the parties for specific solutions.[476]

Judge Murphy's remedial plan addressed many areas including the faculty and administrative employment, the state funding method for higher education, the facilities, the admissions policies, the program duplication, the recruitment of white students and the creation of a monitoring committee.[477] The following is a brief description of the required remedies in

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[475] *Milliken II*, 433 U.S. at 282.

[476] *Knight*, 787 F. Supp. at 1367. This point is succinctly made in a footnote of Judge Murphy's opinion. There he says:

> At the Pretrial Conference the parties were advised of the decision not to bifurcate the trial between issues of liability and remedy. At that time, the parties were also informed that if a finding of liability were made, the Court would draft a remedial decree that would set the parameters by which the Defendants were to conduct themselves in achieving compliance with the law. In large measure this decree does just that. It looks to the parties to propose solutions within the bounds established by the Court.
>
> No one should doubt the resolve of the Court to impose very specific and detailed requirements should the parties fail in their efforts to submit viable plans. This Court is obligated to see that vestiges of discrimination are eliminated root and branch and it will brook nothing less. This is a final opportunity for the State of Alabama and its colleges and universities to regain a measure of control over the system of higher education. It is in the interest of all parties to cooperate with each other in proposing solutions. The Allied Defendants and Plaintiffs should well note that like the other parties to this action, they would fare far better by reaching a consensus and agreement with the Defendants than by taking their chances with the Court.
>
> In some areas, the Court has been very specific concerning the nature of the obligation required to conform a Defendant's conduct to the requirements of the law. In situations where only a precise action will eliminate a vestige of discrimination, the Court has detailed the necessary action.

Id. at 1377-78 n.175.

[477] *Id.* at 1378-82.

each of the areas listed.

(1) Faculty Employment

The district court devised very specific remedies applicable to specific institutions in this area. For example, Auburn University was required to "apply itself with renewed diligence and financial resources" to increase its black faculty. The court indicated that it expected to see material improvement in black faculty numbers by 1994.[478] In addition, Auburn University was required to file a written report with the court within ninety days detailing its intended actions.[479] Other institutions were directed to implement similar recruiting policies for faculty and administrative positions.[480]

(2) Higher Education Funding

The district court directed the State to change its funding formula by June 1992 because it unfairly restricted the funding of HBIs.[481]

(3) Facilities

The district court required the Governor, the Alabama Commission on Higher Education (ACHE) and the Alabama Public School and College Authority (APSCA) to eliminate all vestiges of discrimination remaining in the facilities at ASU and AAMU.[482] The court directed that the Governor, ACHE and APSCA submit a report within 120 days regarding how this requirement would be implemented. The court also required implementation to begin by 1992.[483] Additionally, the court restricted the ability of ASU or AAMU to spend appropriated money for facilities. These schools would need court approval before any funds appropriated for facilities can be spent. The

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[478] *Id.* at 1378.

[479] *Id.*

[480] *Id.*

[481] *Knight*, 787 F. Supp. at 1378-79. The district court included a complete discussion of the funding equities. *Id.* at 1208-81.

[482] *Id.* at 1379.

[483] *Id.*

court was seeking to "ensure that expenditures were directed toward capital projects related to the final dismantling of existing vestiges of discrimination."[484]

(4) Admissions Policies

The court directed Auburn University to review its admissions policy and modify it by 1993. The new policy should demonstrate a good faith commitment to increase its black student population.[485]

(5) Program Duplication

The court directed, among other things, that a committee be created to examine the issue of program duplication between ASU and AU in the business and education areas. The court also gave program preferences to certain schools. Additionally, the court retained approval authority over any new program in Huntsville or Montgomery.[486]

(6) Recruitment of White Students at Alabama State University

The court required ASU to develop a plan to recruit white students and indicated that it expected a material improvement by 1994.[487]

(7) Monitoring Committee and Annual Reporting

Probably one of the most significant remedies was the creation of the statewide Monitoring Committee vested with the responsibility of submitting annual reports to the court regarding compliance with the consent decree. The committee must also submit reports for all defendant universities regarding the following areas:

A. racial composition of the student body;

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[484] *Id.*
[485] *Id.*
[486] *Knight*, 787 F. Supp. at 1380.
[487] *Id.*

B. racial composition of the faculty and administration;
C. minority faculty and administrator recruitment;
D. annual state appropriations;
E. changes in admissions policies;
F. changes in tenure requirements;
G. changes in the ACHE funding formula;
H. changes in ACHE's program approval procedures;
I. minority student recruitment and retention at all levels;
J. new appointments to education governing boards;
K. establishment of cooperative programs between schools; and
L. new facilities construction.[488]

Thus, the district court maintained oversight control of university planning in the areas impacted by this decision. Moreover, the court established its jurisdiction in the remedy section and provided for the term of the decree to last ten years, effective until July 31, 2002.[489] The decree will automatically terminate unless a party has filed a motion requesting the court to extend the term. The decision rests solely with the court regarding the efficacy of granting or denying an extension. The court also reserved the right *sua sponte* to extend the term or modify or amend the terms and conditions of the decree as needed to carry out the mandates of the decree.[490]

While I believe Judge Murphy should have done more in exploring the possibilities of merger, consolidation, and closure of some of the sixteen public institutions of higher education in Alabama, his remedial decree should have a significant impact in Alabama's higher education system. I am troubled by the total absence in his decree of possibly closing some of the state schools. Obviously, Alabama does not have an unlimited treasury. Additionally, Judge Murphy's remedial decree directs the universities to fashion more specific remedies to comply with his decision. I agree with Judge Murphy that these solutions are best developed by the parties involved and I would urge

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[488] *Id.* at 1380-81.
[489] *Id.* at 1381.
[490] *Id.*

Mississippi to work consistently toward a consensus resolution by the parties. However, I am not optimistic about the ability of sixteen or, as the case is in Mississippi, eight college presidents coming together and restructuring the State's higher education system in such a way as to address the concerns articulated by the court in *Knight* and *Ayers*. In this instance I hope I am wrong. Nevertheless, let me offer a few specific ideas to fashion a solution in the *Ayers* case.

E. Recommendations

As this article goes to print, the Mississippi university presidents are meeting, the parties are meeting, and the Governor's advisory panels are meeting in an effort to address the concerns of the Supreme Court in the *Ayers* decision. To date, numerous proposals have surfaced and there has been a fair amount of acrimony regarding which entities are to participate.

Restructuring higher education in Mississippi will take a concerted effort by every group with a vested interest. The controlling factor must be the future of education in this state. Mississippians should not be overly concerned about protecting alma maters or particular turfs. The driving force behind reform should be to provide for quality education in Mississippi for all. However, it is interesting to note that during the October 22, 1992, hearing in the district court, not one person mentioned that the overall goal should be the quality of education twenty years from now. People were too busy attacking each other's proposals and have lost sight of the original goal. To that end, I will offer a few ideas that in no way are meant to be exhaustive, but are intended to be a catalyst for constructive dialogue that will lead to the practical results of restructuring the present system in which Mississippi children are educated.

I will acknowledge at the outset that I am not an education technician. I do not have facts and figures before me regarding teacher salaries, per pupil expenditures and educational budgets for the elementary and secondary schools. What I do know is that the quality of graduate education in Mississippi is directly proportional to the quality of the elementary and second-

ary education levels. What is entirely clear is that the educational system in Mississippi is in dire need of repair at all levels. These recommendations may certainly be viewed as simplistic by some, as impossible by others and as unnecessary by still others. However, I offer these recommendations as points to begin dialogue and as evidence of the necessity to take action. The real tragedy here would occur if no action is taken, resulting in the preservation of the way of life that currently exists.

Imagine for a moment that you are part of the group of people who have the authority to restructure higher education in Mississippi. You come to the negotiating table not with an agenda, not with strong allegiances to any one institution, but with the single minded purpose of improving the quality of education in Mississippi for our children. How would you best accomplish this objective as the State spends approximately $180 million annually on the present system?[491]

There are several possible approaches. One approach would be to focus on the unnecessary program duplication between the HWIs and the HBIs.[492] One of the Supreme

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[491] Andy Kanengiser, *Funding Answer to Problems, Say Black Colleges*, THE CLARION-LEDGER (Jackson, Miss.), June 27, 1992, at 10A Col. 1. The current finances involved at each state supported institution include the following breakdown:

Comprehensive Institutions:	*1991-92 Budget*:	*1991-92 State Appropriations*:
Univ. of Miss.	$348,246,614	$35,184,139
Miss. State Univ.	$244,987,583	$43,076,173
Univ. of Southern Miss.	$135,363,084	$38,132,381
Regional Institutions:		
Alcorn State Univ.	$31,702,139	$ 7,911,408
Delta State Univ.	$27,424,093	$10,508,154
Miss. Valley State	$21,949,975	$ 6,233,461
Miss. Univ. for Women	$20,688,866	$ 6,259,929
Urban Institutions:		
Jackson State Univ.	$66,864,952	$17,202,573

Id.

[492] Unnecessary program duplication refers to the duplication of programs that are not essential to a liberal arts education. In contrast, necessary duplication refers to the idea that every campus needs to teach basic courses fundamental to a proper education. Core subjects such as English, mathematics, and history are not

Court's major concerns was the existence of this unnecessary program duplication.[493] The district court found that the HWIs continued to unnecessarily duplicate programs offered at the HBIs.[494] While elimination of program duplication is a step in the right direction, it offers too little too late. To focus only on unnecessary duplication will not produce a quality university system.

Another possible approach could involve shifting funding levels from the schools that have benefitted from disparate funding in the past to those institutions that have suffered because of it. This could include down-funding the comprehensive institutions while increasing the funding levels at Jackson State and other regional institutions in order to make these schools more attractive for a wider group of people. This would require those institutions which have been down-funded to supplement their budgets with a larger percentage of private contributions. It may also mean that the comprehensive institutions would be required to reduce programs, course offerings, faculty and/or staff. While this approach seems to theoretically provide reparations to the schools that have suffered as a result of the dual system, I do not believe this approach is in the best interest of the State because it only ends up shifting an already limited allocation of resources among the same number of institutions. The long term quality goals under this approach may be sacrificed in order to bring substandard institutions up to par. The effect on the comprehensive schools could also be undesirable if the result is a decrease in quality of education at

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counted in determining "unnecessary" program duplication. This definition is taken verbatim from the Fifth Circuit's panel opinion in *Ayers*, 893 F.2d at 740 n.25.

[493] *Fordice*, 112 S. Ct. at 2740-41.

[494] Ayers v. Allain, 674 F. Supp. 1523, 1541 (N.D. Miss. 1987). This conclusion was reiterated by the Fifth Circuit panel opinion which was subsequently vacated; *see*, Ayers v. Allain, 893 F.2d 732 (5th Cir.), *vacated* 914 F.2d 676 (5th Cir. 1990). The district court's findings on this point are interesting. At the undergraduate level, the HWIs unnecessarily duplicated 34.6% of the 29 programs established at the HBIs. At the Master's level, HWIs duplicated nine of ten programs offered by the HBIs. These figures are about the same when the white comprehensive universities are compared to the HBIs. The white comprehensive universities duplicated 32.7% of the programs offered by the HBIs at the bachelor's level. At the Master's level the duplication increased to 86.2%. *Ayers*, 674 F. Supp. at 1541.

those institutions.

A third approach involves making a decision to withdraw public funds entirely from certain institutions, requiring these institutions to survive privately or not at all. This, of course, should be gradual to allow the institutions and people associated with them to prepare for the transition. There are many configurations that this approach could take. Institutional mergers, consolidations and closures could involve as few as two and as many as five institutions. Whether or not a decision is made to merge Delta State University with Valley or Mississippi University for Women with Mississippi State University, or University of Mississippi and Mississippi State University, considering these mergers, consolidations or closures is, in my view, the appropriate direction toward the ultimate goal of quality education for all Mississippians. Many of my colleagues suggest that any proposal would be better accepted if there were four schools: UM, MSU, USM and JSU. I am quite certain that is correct because of the political realities. However, if the ultimate solution were four schools, I would consider that a major victory. As I explain later, I would start with three schools.

The recent stories in the newspaper regarding the unlikely closure of colleges are disheartening. Moreover, the secret nature of the meetings between the Board of Institutions of Higher Learning, State Attorney General's office and the private plaintiffs are equally disheartening when the issue of higher education in Mississippi is an issue that is at the zenith of public interest and public impact.[495]

Additionally troubling is the report from the State Bond Commission that it will provide $5.5 million in building improvements for Mississippi Valley State University and Alcorn State University. The statement by the Attorney General to

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[495] THE CLARION-LEDGER (Jackson, Miss.), Oct. 5, 1992, at 1A Col. 1. The headlines on Monday, October 5th read: "Ruling Not Likely to Close Colleges: Mergers, Down-sizing Are Probable Parts of a Desegregation Solution." This article went on to discuss that only four public colleges have closed over the last ten years. Two were community colleges, Los Angeles Metropolitan College and North Country Community College in Elizabethtown, New York. The other two were Boston State College and the University of South Dakota at Springfield. *Id.* at 5A.

one of the Commission members, that the "decision would help the State argue that current funding decisions no longer reflect the university system's segregated past,"[496] does nothing to help coordinate an approach to restructuring the education system. Indeed, it does the opposite; it continues business as usual but slightly adjusts the allocations to the HBIs.

In my view this does not meet the constitutional requirements in *Fordice*, to carefully explore on remand whether the "retention of all eight institutions itself affects student choice and perpetuates the segregated higher education system, whether maintenance of each of the universities is educationally justifiable, and whether one or more of them can be practicably closed or merged with other existing institutions."[497] What I am suggesting the parties consider may not be constitutionally required but, I think, would certainly meet the spirit and letter of the Supreme Court's direction in *Fordice*. Moreover, the approach would reflect a new beginning for Mississippi education. One that promotes efficiency over duplication, economy over waste and quality over mediocrity. Therefore, I offer the following recommendations as starting points for discussion.

Recommendation One:

First, Mississippi needs to redirect its priorities in a manner that will place elementary, secondary and higher education as top priorities for funding and program development. If education does not become the State's number one priority, then the amount of restructuring will not make a difference. In order for Mississippi to change its destiny it must redirect all of its resources into education. This must begin at the bottom level and move progressively upward. The elementary and secondary school systems in the State need an infusion of revenue to develop better facilities, programs, equipment and to hire better teachers. The quality of public education offered should be measurable and should be consistent throughout the State. While minor differences should be expected, there should

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[496] *State Bumps Black University Building Projects Award*, THE CLARION-LEDGER (Jackson, Miss.), Sept. 23, 1992, at 1A Col. 2.

[497] *Fordice*, 112 S. Ct. at 2743.

not be drastic differences in the quality of education from one locality to the next. Moreover, the institutions of higher learning should be able to rely on high school grade point averages to reflect a certain level of academic performance throughout the State. Without a strong and consistent elementary and secondary system, the higher education system will continue to flounder.

Recommendation Two:

Mississippi's total student population enrolled by the eight universities is approximately 60,000.[498] Total enrollment of the two-year colleges is approximately 67,000.[499] Given these student numbers, there is no reason for the State to attempt to continue the financing of eight universities. Mississippi currently funds fifteen two-year colleges and eight four-year colleges. Mississippi is the poorest state in the country and the least able to fund the schools that it supports.[500] The State should work toward reducing the number of junior and senior colleges. This can be accomplished through merger, consolidation and closure.

Recommendation Three:

At the senior college level, the State can provide for its student population by financing two or three comprehensive universities. The optimum number of four-year colleges may be three geographically divided colleges with one school in the north, one school in the center of the state and one school in the south. This offers several advantages. First, it allows geographic accessibility for the entire state. Second, given the current student population at four-year colleges (approximately 60,000) each campus could support approximately 20,000 students. That size is a comfortable size for a university and would not require excessive major facility development with the exception of Jackson, Mississippi. Third, this structure will potentially allow for the redirection of approximately thirty-one

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[498] Lea Ann Brandon, *Neighboring States Put High Prices on Schools*, THE CLARION-LEDGER (Jackson, Miss.), Dec. 10, 1990, at A1, A7.

[499] Lea Ann Brandon, *State's 15 2-Year Colleges Caught in Budget Crunch*, THE CLARION-LEDGER (Jackson, Miss.), Dec. 10, 1990, at A7.

[500] U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1991 440 (11th ed. 1991).

million dollars of state appropriated revenue, and potentially the redirection of $101 million in budgets.[501] All of this is certainly not the product of an economic study, but the speculation of one trained in the law, not economics. It would be helpful to place this proposal under an economic microscope and review the findings. In any event, the parties should be interested in pursuing these questions before decisions are made. Instead of being racially identifiable, these institutions should pull all students from the represented regions. All three institutions would be part of what I will call the "Mississippi University System."

Recommendation Four:

In order to carry out the goal articulated in Recommendation Three, it will be necessary to consider merger, consolidation and closure of several existing four-year schools. It may also be possible to utilize some existing facilities as branch campuses of the major institutions. The State should develop a representative committee to consider which schools should be merged, consolidated or closed. For example, MVSU, DSU, MUW and ASU are in my view, prime candidates for merger, consolidation or closure based on facilities, student populations and budgets. Additionally, UM and MSU are prime candidates for merger and consolidation based on their proximity to each other in the northern region of the state. The State of Mississippi needs a comprehensive university in its capital. Jackson State University is the only urban institution in the state and could be enhanced to provide a more comprehensive role. To that end, JSU facilities should be enhanced, programs developed, buildings relocated or renovated in order to accomplish

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[501] The $31 million figure was arrived at by combining the state appropriations from ASU, DSU, MUW and MVSU. The $101 million figure was arrived at similarly by combining the budgets from these schools. Of course, the savings could be greater if an additional school's appropriations and budget were added. For example, if MSU were added, the figures would be $74 million for state appropriations and $345 million for budget. If UM were added instead of MSU, the figures would be $66 million and $449 million, respectively. Obviously these calculations do not factor revenues generated from the sale of facilities nor does it factor costs attributable to constructing additional facilities, increasing faculties and other such associated expenditures, but it seems to provide more money to be distributed among four institutions. I cannot help but conclude that this will improve the quality of education overall.

its role as part of the flagship system. This could include, for example, moving certain major programs from Oxford or Starkville to Jackson in order to make the school attractive to white students.[502]

Recommendation Five:

While the historically black university plays a critical role in educating black students across the country, the reality reflected in graduation rates and job placement surveys shows a market in which graduates from HBIs, particularly those in Mississippi, are at a competitive disadvantage with graduates from comprehensive institutions in Mississippi.[503] In Mississippi, a degree from an HBI has a crippling effect on the graduate as he or she enters the real world's job market. I am not suggesting that there is no longer a need for HBIs; I am suggesting that if they need to continue operating as racially identifiable institutions they should do so without the benefit of public tax dollars. If these single interest institutions are to continue to survive and thrive, they must do so through private contributions. This, of course, applies to any single interest or primary purpose institution.

Recommendation Six:

Other single interest institutions like MUW should also be

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[502] Consideration should be given to relocating the law school, medical school or veterinary school and dental school programs from various institutions around the state to Jackson. The graduate schools did not develop along a dual educational system as the undergraduate colleges did. The suggestion regarding the law school, or the medical school, to become associated with Jackson State or the Mississippi University at Jackson is in order to make the facility the kind that will attract the state's white students as well as black students. The more critical issue is not whether we move the law school or medical school to the Mississippi University at Jackson, but rather, whether we can through enhanced funding, facilities and undergraduate programs, make the Mississippi University at Jackson a quality educational facility.

In 1928 Governor Bilbo's inaugural address included a proposal to move the University of Mississippi to Jackson. Governor Bilbo's intention was to consolidate the institutions of higher learning in a single greater university in the Capital City. This effort failed at that time but consolidation is absolutely necessary today. *See* 2 RICHARD AUBREY MCLEMORE, A HISTORY OF MISSISSIPPI 430-31 (1973).

[503] Gil Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 MINN. L. REV. 148, 155, 161 (1987) (Professor Kujovich provides historical basis for competitive disadvantages between graduates from HBIs and HWIs).

supported through private, not public, contributions. The mission of this institution should not be supported by public tax dollars.

Recommendation Seven:

The Governor, State Board of Institutions of Higher Learning and the parties in the *Ayers* litigation should explore the most efficient way to restructure graduate and professional degree programs at the remaining comprehensive institutions in order to eliminate the kind of unnecessary program duplication that currently exists among institutions.

Recommendation Eight:

The Governor should establish a State Education Committee comprised of knowledgeable people representing a cross-section of Mississippians charged specifically with the task of monitoring the following areas at the System's three institutions:

1. Racial composition of the student body;
2. Racial composition of the faculty and administration;
3. Changes in admissions policies;
4. Changes in tenure requirements;
5. New facilities construction;
6. New appointments to the State College Board;
7. Any changes in program development;

Recommendation Nine:

The Mississippi University System will need to adopt preparatory programs for entering students. This need is demonstrated because the skill level of the entering freshman is below the national average of entering freshman.[504] Thus, each regional campus should have in place a college of basic studies geared toward providing basic instruction in a core curriculum in order to better prepare students for college level work. Alternatively, the junior colleges could be better utilized to meet this need, thereby obviating the necessity for such programs at the four-year colleges.

Recommendation Ten:

The Mississippi University System should adopt flexible

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[504] THE AMERICAN COLLEGE TESTING SERVICE, THE HIGH SCHOOL PROFILE REPORT 2 (1992).

admissions policies that will accommodate all of the approximately 60,000 students. The admissions standards should reflect a combination of ACT, GPA, work and life experiences. Those students who do not meet the University System's admission requirements will be eligible to enroll in the Junior College system and possibly transfer to a four-year school after successfully completing a Junior College curriculum.

Recommendation Eleven:

In the event of facility closure as a result of the restructuring, the University System should attempt to utilize those facilities to the extent practicable. If such facilities cannot be used by the University System, an attempt should be made to sell or donate the facilities for some alternative use.

Recommendation Twelve:

The University System should, to the extent possible, incorporate the best teachers and administrators from any institution that is merged, consolidated or closed. Recognizing that there will necessarily be a human cost to this restructuring, such costs should be minimized by providing alternative employment either within the University System or by placement assistance within and outside of the state.

Recommendation Thirteen:

The State Legislature should redirect all revenue expended on the other five institutions to the University System. Moreover, it is possible that merger, consolidation and/or closure could be more expensive than funding eight institutions. To the extent that any additional revenue is needed, all revenue raised from an increased sales tax and real property tax should be earmarked for education. If there is a revenue surplus from the merger, consolidation and/or closure, the revenue should be retained for educational use at either the elementary, secondary or higher education level.

Recommendation Fourteen:

The University System should develop incentives that will attract and keep a top quality faculty at its institutions. Such incentives include, but are not limited to, enhanced salaries, endowed chairs, housing supplements in the form of long term housing or low interest rate mortgage loan assistance, low interest loan programs, summer research stipends and research

assistants.[505]

While these suggestions may seem radical, simplistic or unreasonable to some, the intent is to provide a framework within which all of Mississippi's children will be better educated in the future. The costs may indeed be higher in the short term but the benefits undoubtedly will be greater in the long term.

VI. CONCLUSION

The *Fordice* decision represents an opportunity for Mississippians to seize the day and regain a measure of control over their system of higher education. But it is only an opportunity. The parties must be able to develop a solution, a consensus among themselves, rather than relying on a judicially fashioned remedy to these perplexing issues. The matter of education has historically been a local enterprise. Mississippi needs to show its capacity for leadership now more than ever before because to fail now means, very simply, to condemn Mississippi to a future of poor educational achievement and poor economic development. As this article goes to print, the *Ayers* litigation seems destined to continue indefinitely. The parties have been unable to agree on the "remnants" which should be properly in issue before the court.[506] To further complicate matters, several universities have filed motions to intervene because they maintain the position taken by the Board of Trustees for Institutions of Higher Learning regarding consolidation and merger does not adequately represent their interests.[507]

The *Fordice* opinion represents a clarification of the mean-

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[505] While most of the recommendations were developed as a result of reviewing the cases in this area, these ideas are not unique. *See*, Comment, *Integrating Higher Education: Defining the Scope of the Affirmative Duty to Integrate*, 57 IOWA L. REV. 898, 910 (1972) (discussion by student author on concept of developing a unitary system of higher education through mergers and consolidations).

[506] *See Plaintiffs' Unified List of Policies and/or Practices Properly in Issue Before this Court*, United States v. Fordice, Civil Action No. 6C75-9-B-0 (Nov. 19, 1992); *see also The Board of Trustee's Proposed Stipulations Regarding Remnants* (Nov. 19, 1992).

[507] *See* District Court case file Civil Action No. 6C75-9-B-0, Nos. 263, 257, 268, 269, 266, 267, and 270.

ing of *Brown I* and *II*. It was because the remedies were so complex in this area that the Supreme Court left it to the local district courts to fashion remedies that were particularly suited to the local problems.[508] But, most importantly, *Brown I* and *II* declared that the Constitution does not permit a dual society. Whether or not that duality is in elementary education, secondary education, universities or on the golf course, *Fordice* dramatically emphasizes the meaning of *Brown I* and *II*.

Without delay, Mississippi must enter the fray and change its higher education system.

As President Theodore Roosevelt said:

> [I]t is not the critic who counts, not the man who points out how the strong man stumbles, where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena; whose face is marred by dust and sweat and blood; who strives valiantly; who errs and comes short again and again; who knows the great enthusiasm, the great devotion, and spends himself in a worthy cause; who, at the best, knows in the end the triumph of high achievement; and who, at the worst, if he fails, at least fails while daring greatly, so that his place shall never be with those cold and timid souls who know neither victory nor defeat.[509]

Mississippians have the opportunity to step into the arena. I only hope we all have the courage to make the difficult choices that need to be made.

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[508] *See* Note, *Integration of Higher Education in the South*, 69 COL. L. REV. 112 (1969) (enlightening discussion of court's duty).

[509] JACK BASS, UNLIKELY HEROES 173 (1981).

APPENDICES

APPENDIX A

PUBLIC UNIVERSITIES IN MISSISSIPPI

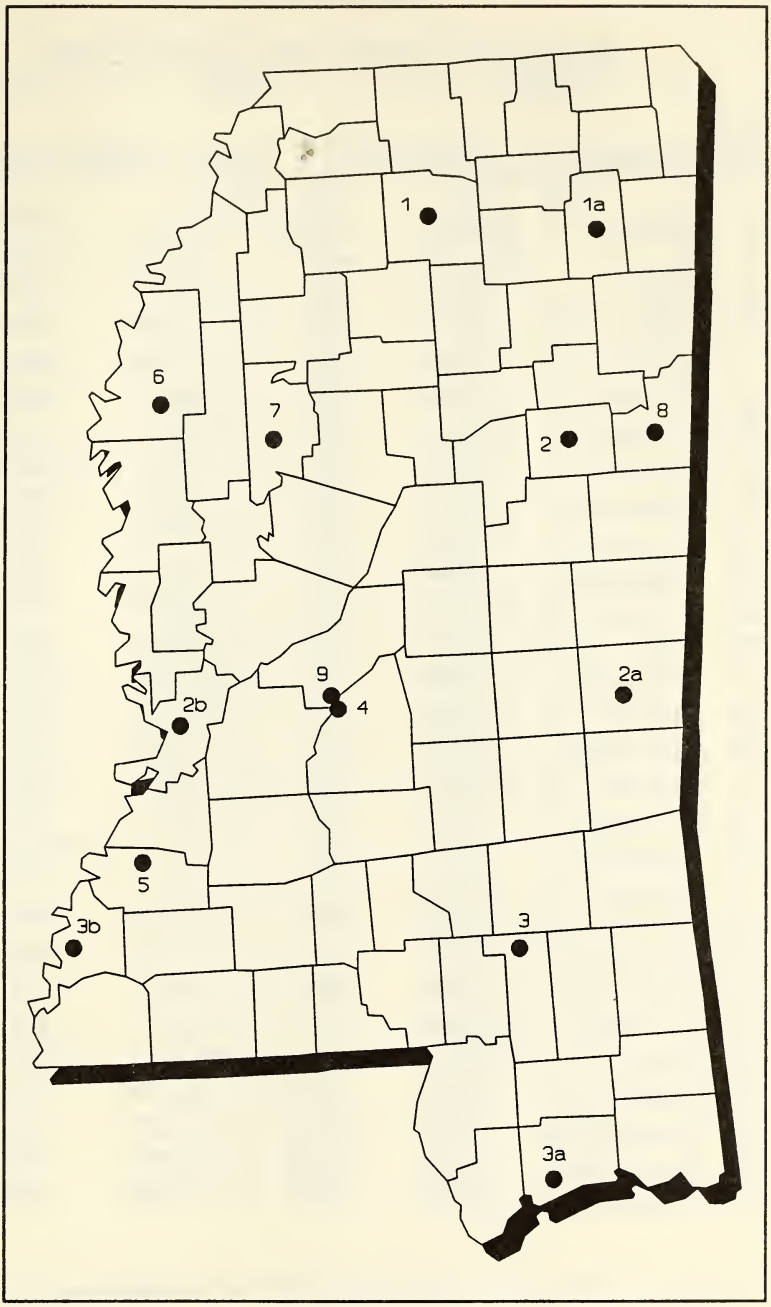
Map Key	*Title*
1	University of Mississippi
1a	Tupelo Campus †
2	Mississippi State University
2a	Meridian Campus †
2b	Vicksburg Campus †
3	University of Southern Mississippi
3a	Gulf Coast Campus †
3b	Natchez Center Campus ††
4	Jackson State University
5	Alcorn State University
6	Delta State University
7	Mississippi Valley State University
8	Mississippi University for Women
9	University Center, Jackson †
	University of Mississippi †
	Mississippi State University †
	Jackson State University †

† Degree Granting Off Campus Centers
†† Centers Offering Only Non Credit Extension Courses

Source:

Office of External Affairs, Division of Business Research, College of Business and Industry, (Mississippi State, Mississippi): *Mississippi Statistical Abstract*, 1990, pp. 208, 216.

Continuation of Appendix A



APPENDIX B

MISSISSIPPI COUNTY POPULATION BY RACE

*Map Key**	*County*	*White*		*Black*	
67	Adams	18,028	51.0%	17,212	48.7%
2	Alcorn	28,085	88.5	3,540	11.2
69	Amite	7,272	54.6	6,038	45.3
36	Attala	11,114	60.1	7,299	39.5
4	Benton	4,869	60.5	3,168	39.4
26	Bolivar	15,259	36.4	26,326	62.9
20	Calhoun	10,829	72.6	4,027	27.0
29	Carroll	5,560	60.2	3,654	39.6
21	Chickasaw	11,060	61.2	6,981	38.6
31	Choctaw	6,319	69.7	2,731	30.1
53	Claiborne	1,994	17.5	9,340	82.1
59	Clarke	11,312	65.3	5,977	34.5
23	Clay	9,789	46.3	11,266	53.3
17	Coahoma	11,001	34.7	20,454	64.6
55	Copiah	13,602	49.3	13,920	50.4
62	Covington	10,699	64.7	5,795	35.1
6	DeSoto	58,860	86.7	8,675	12.8
74	Forrest	46,672	68.3	21,001	30.7
66	Franklin	5,290	63.1	3,079	36.8
77	George	15,025	90.1	1,587	9.5
76	Greene	7,999	78.3	2,194	21.5
25	Grenada	12,563	58.3	8,916	41.4
80	Hancock	28,625	90.1	2,774	8.7
81	Harrison	127,630	77.2	32,281	19.5
51	Hinds	123,177	48.4	129,558	50.9
37	Holmes	5,176	24.0	16,375	75.8
38	Humphreys	3,856	31.8	8,222	67.8
40	Issaquena	833	43.6	1,072	56.2
11	Itawamba	18,569	92.9	1,359	6.8

* See Map, Page 507.

Continuation of Appendix B

Map Key*	County	White		Black	
82	Jackson	90,114	78.2%	23,581	20.5%
58	Jasper	8,410	49.1	8,687	50.8
54	Jefferson	1,185	13.7	7,467	86.2
63	Jefferson Davis	6,330	45.1	7,675	25.0
61	Jones	46,193	74.5	15,489	25.0
46	Kemper	4,407	42.6	5,739	55.4
14	Lafayette	23,151	72.7	7,980	25.1
73	Lamar	26,599	87.4	3,637	12.0
47	Lauderdale	48,706	64.5	26,280	34.8
64	Lawrence	8,300	66.6	4,132	33.2
44	Leake	11,086	60.1	6,558	35.6
12	Lee	51,260	78.2	14,049	21.4
28	Leflore	14,516	38.9	22,642	60.6
65	Lincoln	21,162	69.9	9,038	29.9
33	Lowndes	36,736	61.9	22,041	37.2
43	Madison	29,789	55.4	23,731	44.1
72	Marion	17,733	69.4	7,721	30.2
5	Marshall	14,842	48.9	15,378	50.7
22	Monroe	25,394	69.4	11,097	30.3
30	Montgomery	6,916	55.8	5,440	43.9
45	Neshoba	16,945	68.3	4,611	18.6
48	Newton	13,697	67.5	5,831	28.7
34	Noxubee	3,959	31.4	8,588	68.1
32	Oktibbeha	24,064	62.7	13,171	34.3
15	Panola	15,376	51.3	14,533	48.4
79	Pearl River	32,888	85.0	5,545	14.3
75	Perry	8,333	76.7	2,447	22.5
70	Pike	19,931	54.0	16,873	45.7
13	Pontotoc	18,917	85.1	3,246	14.6
9	Prentiss	20,477	88.0	2,741	11.8

* See Map, Page 507.

Continuation of Appendix B

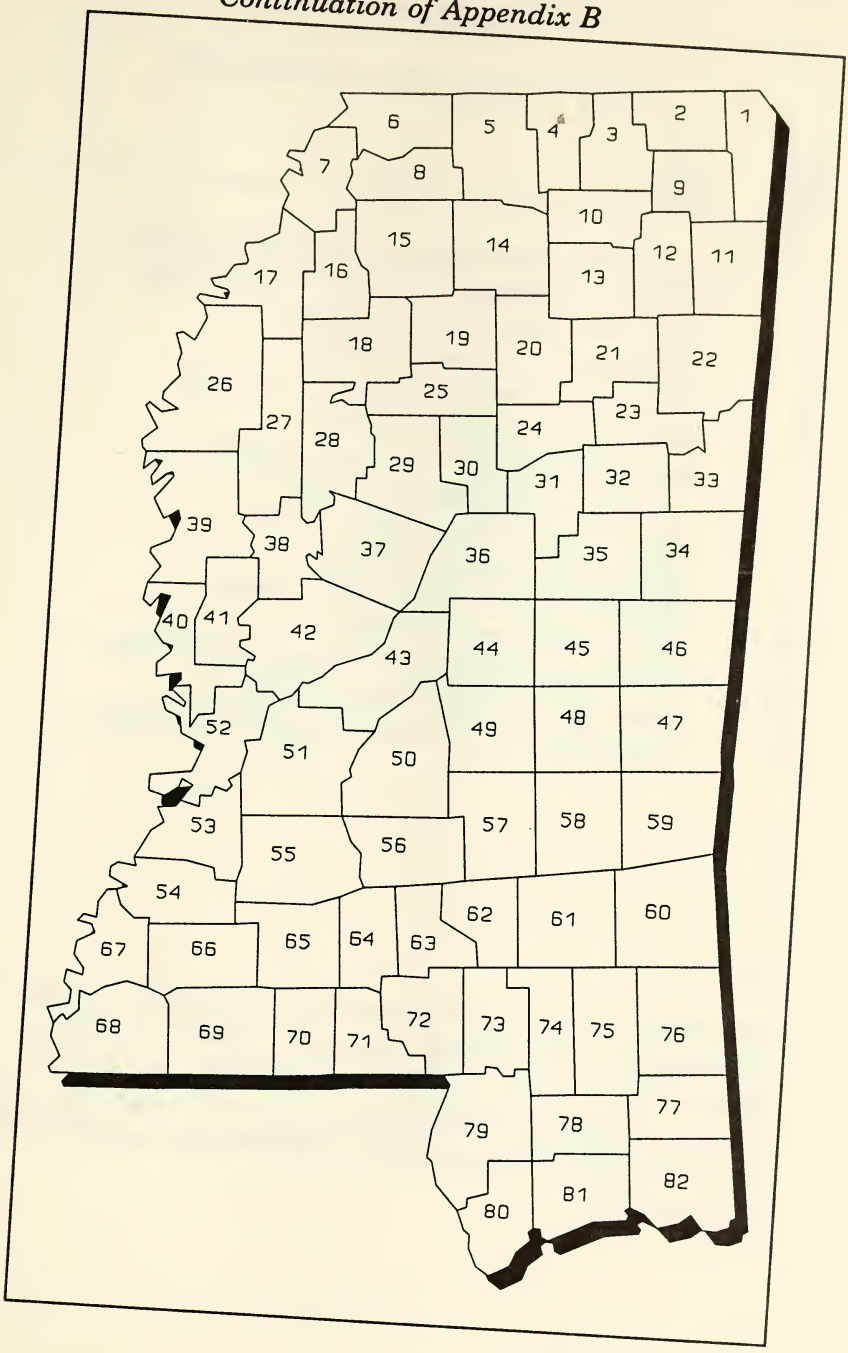
Map Key*	County	White		Black	
16	Quitman	4,250	40.5%	6,193	59.0%
50	Rankin	72,033	82.6	14,610	16.8
49	Scott	14,829	61.4	9,171	38.0
41	Sharkey	2,339	33.1	4,686	66.3
56	Simpson	16,124	67.3	7,737	32.3
7	Smith	11,516	77.8	3,244	21.9
78	Stone	8,362	77.8	2,344	21.8
27	Sunflower	11,604	35.3	21,092	64.2
18	Tallahatchie	6,257	41.1	8,881	58.4
8	Tate	13,945	65.1	7,417	34.6
3	Tippah	16,251	83.2	3,233	16.6
1	Tishomingo	17,010	96.2	631	3.6
7	Tunica	1,992	24.4	6,148	75.3
10	Union	18,804	85.1	3,213	14.5
71	Walthall	8,252	57.5	6,054	42.2
52	Warren	28,879	60.3	18,666	39.0
39	Washington	28,334	41.7	39,197	57.7
60	Wayne	12,506	64.1	6,957	35.6
24	Webster	7,953	77.8	2,254	22.1
68	Wilkinson	3,123	32.3	6,532	67.5
35	Winston	11,151	57.4	8,094	41.7
19	Yalobusha	7,479	62.2	4,526	37.5
42	Yazoo	11,958	46.9	13,434	52.7

Source:

Center for Population Studies, *1990 Census of Population and Housing—Characteristics of Population*

* See Map, Page 507.

Continuation of Appendix B



APPENDIX C

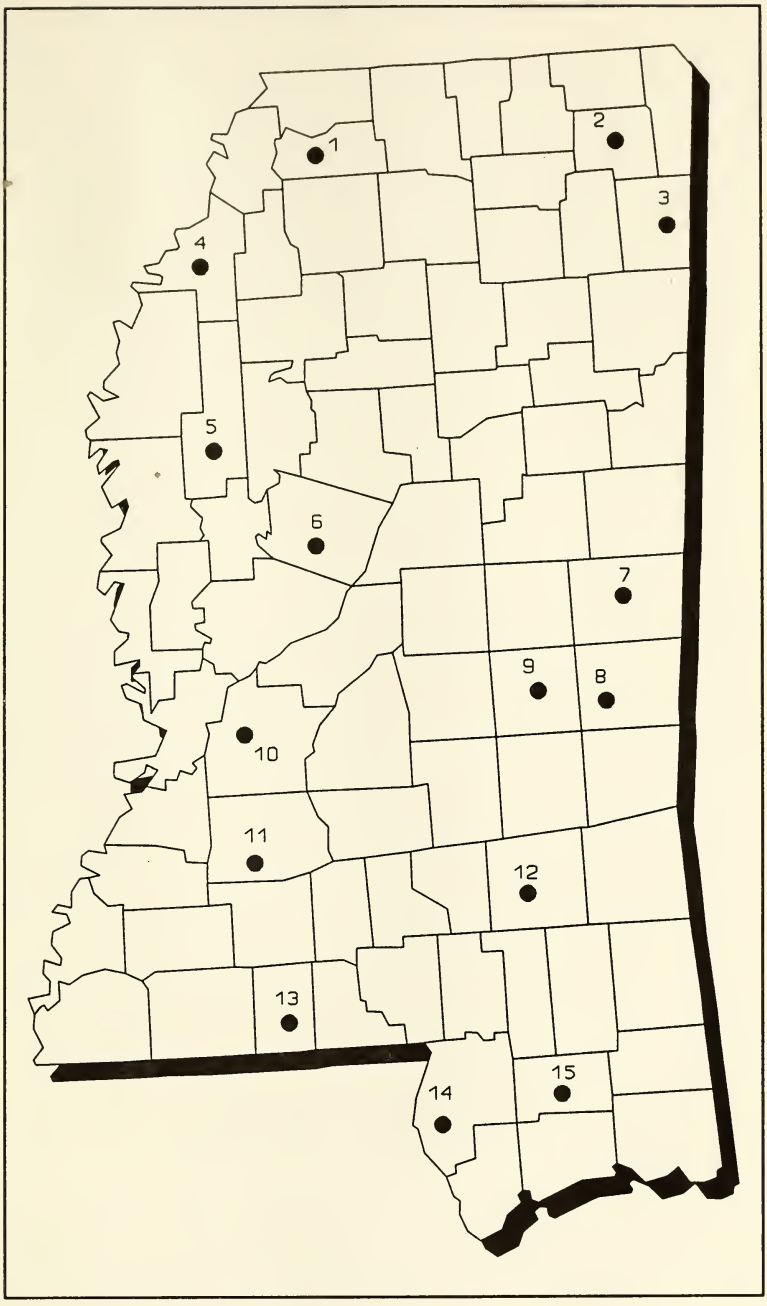
JUNIOR COLLEGES IN MISSISSIPPI

Map Key:	*Title*
1	Northwest Mississippi Community College
2	Northeast Mississippi Community College
3	Itawamba Community College
4	Coahoma Community College
5	Mississippi Delta Community College
6	Holmes Community College
7	East Mississippi Community College
8	Meridian Community College
9	East Central Community College
10	Hinds Community College
11	Copiah-Lincoln Community College
12	Jones Community College
13	Southwest Mississippi Community College
14	Pearl River Community College
15	Mississippi Gulf Coast Community College

Source:

Mississippi Employment Security Commission, Labor Market Information Department (Jackson, Miss.): *Guide to Labor Market Information*, 1990, at 32; Office of External Affairs, Division of Business Research, College of Business and Industry (Mississippi State, Miss.): *Mississippi Statistical Abstract*, 1990, at 144.

Continuation of Appendix C



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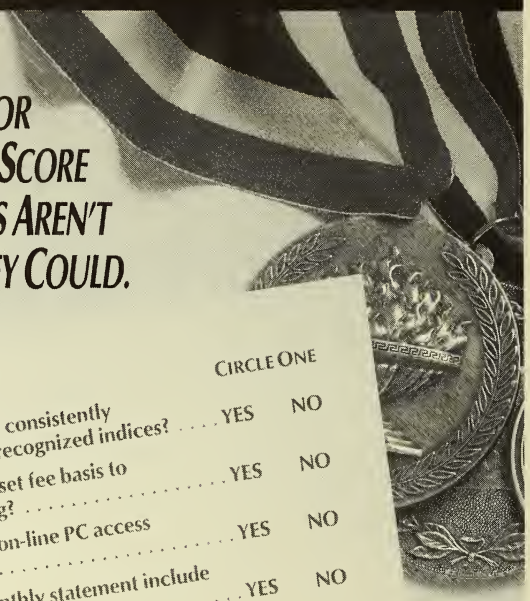

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3. Does your advisor offer on-line PC access to your portfolio?	YES	NO
4. Does your advisor's monthly statement include performance analysis?	YES	NO
5. Is your advisor paying you the highest possible yield on money market investments?	YES	NO

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